



IWIRC Newsletter

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From the Chair

Leslie A. Berkoff, IWIRC Chair

It is with a true sense of pride, accomplishment and nostalgia that I step down as Chair at this year's fall conference. It seems like these past four years have flown swiftly past. As I look back, I marvel at how much the past two boards have been able to accomplish using the seeds that were so well planted by prior boards. The results have been that this organization has continued to blossom into a continuously growing global organization.

IWIRC now consists of an expanded Board, with Vice Directors in place for succession planning, a broad Executive Committee, including a newly appointed Director of Development to stimulate our financial growth. We have also segmented the Board into three geographic regions, with networks that are constantly forming and expanding. However, we have not just grown by the number of number of networks which exist globally, but in terms of what IWIRC provides to our members as an organization both in the way of benefits and programming. We have added additional regional and international programming as well as multiple other venues and forums for our members to interact locally, regionally, nationally and internationally. We now have a grant program that facilitates the development and hosting of new events, regionally, nationally and internationally. We have added additional programming at both the National Conference of Bankruptcy Judges and the American Bankruptcy Institute further expanding our recognition and footprint in this industry. To assist the growth of our Networks, we have added a leadership development summit. Finally, we have added an additional award –the Woman of the Year in Restructuring, and an additional event at the American Bankruptcy Institute's Winter Leadership Conference to celebrate that award.

All of these accomplishments are by no means a reflection of the work of one person, but a result of a tremendous amount of work by a truly talented and dedicated Board and as well as the tireless network chairs, and of course our very hardworking membership. To each and every one of you I say thank you. Over these years I have

pleasure of meeting so many of our Network Chairs, Board members and individual International and Network members during our various conferences or visits to local network events. I am fortunate that I can now count so many of you as my friends, colleagues and role models. I know that these relationships personal, business or both, will only continue to grow during these next few years.

For me, serving as your Chair has been the highlight of a journey that began over eleven years ago when I joined IWIRC as an International Member and Member of the New York network. My membership and role in IWIRC has afforded me the ability to grow my professional profile both within my firm and without and has offered me the opportunity to be a real resource to my firm, partners and clients. I thank you for having given me the opportunity to serve on your Board and as your Chair. I look forward to the continued growth and success of IWIRC under the tutelage of the new Board and I will continue to serve this organization and its members. Thus, I say good bye (but not farewell) with a simple but heartfelt thank you to all of those whose efforts have led to the growth of IWIRC and achieved the benefits which we all share.

Best regards, Leslie

CALL FOR NOMINATIONS!! 2008 Woman of the Year in Restructuring

DEADLINE: October 13, 2008

IWIRC is looking to once again honor a woman for her recent contributions to and/or lifetime achievements as part of the restructuring industry. She may be an attorney, judge, banker, turnaround manager or academic. She is actively engaged or recently retired from the restructuring industry - and from anywhere in the world. To make sure we don't miss anyone, we need your help.

IWIRC membership is NOT a requirement to make a nomination, nor to be honored.

Take a few minutes to consider a woman who...



- Inspired and/or skillfully led a restructuring team
- Provided creative solutions and innovative legal applications
- Creates win-win-win outcomes
- Shows exceptional leadership
- Has made an extraordinary contribution
- Went above and beyond ... and made a difference

These achievements do not have to be in nationally renowned cases or even resulting in landmark decisions, they just have to be out of the ordinary. Please feel free to think out of the box on this. We welcome all entries and are not just looking for the most senior woman or the most important case! Please consider those women who have consistently demonstrated a commitment to enhancing the restructuring industry.

E-mail your nomination to info@iwirc.com

- Send contact information including e-mail addresses for you and your nominee
- Tell us why your nominee fits this award, and why we should consider her for this award. Please be descriptive and include facts or examples that help exemplify why you nominated this woman.

The IWIRC Board of Directors ratifies all selections and its decisions are final.

The **2008 Woman of the Year in Restructuring** award will be presented on December 5th, during the ABI Winter Leadership Conference.

INTRODUCING...

THE NEW IWIRC BOARD!

We are pleased to announce the election of IWIRC's 2008-2010 board of directors. The new Board will be inducted at IWIRC's 15th Fall International Conference to be held September 23-24 in Scottsdale, AZ, USA.

Debra Kuptz, a Managing Director of AlixPartners, will assume the chairmanship of the board for the coming term.

"It has been one of the greatest pleasures of my career to be part of IWIRC and to help it thrive. I am honored to be able to serve our members in this new role and I am grateful to all the leaders before me who have done such a brilliant job in creating IWIRC's unique culture," Kuptz said.

Executive Committee:

Chair: Debra Kuptz, AlixPartners, LLP, Southfield, MI, USA. A member of IWIRC since its inception in 1994, Debra was a founder of the Michigan Network in 1996. She became a member of the International board in 2000, and assumed leadership of the Recruiting Committee. During her tenure in that position, she implemented recruiting campaigns that drove increased membership. Most recently Debra served two terms as Vice Chair during which time she introduced a grant program to assist Networks in hosting regional events, and created the annual Woman of the Year in Restructuring recognition program.

Vice-Chair: Judith Elkin, Haynes and Boone LLP, New York, NY, USA. Judith has been a founding member of IWIRC and served as Secretary /Treasurer since 2002.

Secretary-Treasurer: N. Lynn Hiestand, Skadden, Arps LLP, London, England. Lynn has served on the IWIRC Board as International Chair since 2004 and received the Fetner Award for Outstanding International IWIRC Contribution in 2006. She was a founder of the European Network.

Development Director: Patricia Redmond, Stearns, Weaver, P.A., Miami, FL, USA. Patricia A. Redmond has been a member of IWIRC for over 15 years. Since 2002 she has served as Network Director and is beginning her term as Director of Development, an Executive Board position.

Directors:

Communications (Global): Leigh Ann Ihrig, AlixPartners, LLP, Dallas, TX, USA .

Membership Services (Global): Jennifer Meyerowitz, Alston & Bird, LLP, Atlanta, GA, USA

Networks (Regional): Europe – Annerose Tashiro, Schultze & Braun, Achern, Germany;
North America - Beth Hanson Goodrich Corporation, Charlotte, N.C., USA

Recruitment (Regional): Europe – Catalina Echevarria Suarez-Granda, Merrill Brink, Madrid, Spain; **North America - Francine Gordon**, Kurtzman Carson Consultants LLC, Los Angeles, CA, USA

Program Directors: Europe – Katherine Stones, Weil Gotshal & Manges, LLP, London, England
North America - Jennifer McLemore Christian & Barton, Richmond VA, USA

**Italian Bankruptcy Law requires Restyling only one year after its enactment***Livia OGLIO, LL.M., Studio Legale Sutti*

There is no peace for the insolvency practitioners nowadays in Italy after a row of changes brought in two years to the existing rules applicable to the various insolvency procedures, unfortunately by (the usual) way of changing, deleting or adding single sections into the existing laws.

The major intervention to the Bankruptcy Act was voted by the Council of Ministries on 22 December 2005 pursuant to the delegation of legislative powers by the Parliament contained in Law no. 80/2005. By that act, Parliament had eventually decided that it was time to enact a “comprehensive reform” of the Italian insolvency procedures, still governed mainly by a Royal Decree dating back to 1942.

Since enactment of the 2005 reform, seminars among practitioners and judges, as well as articles by scholars are flourishing, as both the technical drafting is in various sections unclear (or wrong!) and some changes to the substantive or procedural rules have already appeared controversial or unsatisfactory.

The government has been forced in June 2007 to enact an additional piece of legislation (hereinafter “Supplementing Degree”) ¹ to supplement and (especially) amend the new Bankruptcy Act which entered into force on 16 July 2006.

The reform of the Bankruptcy Act had modified not only the ordinary bankruptcy regime but also the other pre-bankruptcy or ancillary insolvency procedures pursuant to some general guiding principles, which are: a) strengthening the role and powers of the Trustee and of the Committee of creditors, while reducing those of the bankruptcy court; b) increasing the number of entities excluded from the application of the bankruptcy law; c) providing effective judicial remedies to allow preserve the businesses as an ongoing concern, rather than liquidating them; d) providing for the possibility that the debtor is discharged of its residual obligations towards the creditors at the end of the bankruptcy liquidation (subject to conditions).

New changes have been brought again this year to the Bankruptcy Act (as amended) in several critical areas of our bankruptcy regime, such as the scope of exemption from bankruptcy, termination of bankruptcy, arrangements with creditors, remission of debts, as well as in various procedural

provisions.

Scope of exemption from bankruptcy

As we mentioned, the Bankruptcy Act dates back to 1942. Article 1 of the Bankruptcy Act establishes that public entities and small-size enterprises are excluded from liquidation under the Bankruptcy Act. In order to determine whether the business does fall within the exclusion, the law sets forth the relevant interpretative criteria. Those criteria were changed in 2006 and have been changed again this year. The government intended to avoid the costs of bankruptcy procedures involving low value claims against small estates. However, the way the thresholds had been determined in 2006 was too far reaching and led to exclusion from bankruptcy (and henceforth from criminal sanctions only applicable in the event of bankruptcy) of enterprises responsible for huge liabilities. In some areas of Southern Italy they had cut almost 90% of the new bankruptcy procedures, which are reduced by 47% as national average¹.

By the new law, the definition of small-size enterprise is abandoned; quantitative criteria are introduced in order to determine the area of the exemptions, applicable to commercial enterprises (agricultural ones remain excluded). Such criteria are now based on the enterprise's dimensions and overall indebtedness. They are namely: assets invested equal to or less than Eur 300,000 in the three accounting years before the opening of the procedure; average income (brut) equal to or less than Eur. 200,000 in the three accounting years before the opening of the procedure; total liabilities, even including debts not yet matured equal to or less than Eur. 500,000¹.

It is also important to note how the burden of proof is now distributed (reversing the previous regime). The debtor shall prove that none of the thresholds above is exceeded in order to escape the applicability of the bankruptcy or judicial composition procedures.

The new rule will change the existing system in that, if the debtor does not appear in court after he has been notified of the application for opening the bankruptcy procedure and does not offer evidence in rebuttal to the submissions made by the applicant, the bankruptcy procedure can be opened even in cases of “small bankruptcies” in which under the previous regime it could have not. It may be expected, however, that this will not occur automatically, but only where the bankruptcy court believes that the opportunity to pursue the bankruptcy liquidation and/or, more importantly, the criminal prosecution of the company's directors is worth the social costs of the procedure.

**Exemptions from claw-back actions**

Another substantial modification concerns the list of exemptions from claw-back actions, already broadened by the Decree Law no. 35 of 2005, bringing urgent changes to the Bankruptcy Act.

An additional exclusion is now inserted in the law: it concerns the sales and preliminary sale agreements registered in the Land Registry concerning residential properties that are to be used as family home by the purchaser or by his close relatives, to the extent that they are concluded at fair price and that the effects of the registration have not yet ceased (they will be in one year from the expiry of the date for completion or in three years from the registration of the preliminary sale agreement).

This provision has clearly a social protection rationale in an attempt to cope with the still large number of bankruptcy of building companies that leave many families in distress; though its wording raises a number of interpretative issues.

Arrangements with creditors

Some substantial changes are introduced into the regime of the arrangements with creditors leading to the definition of the bankruptcy procedure and to the end of the bankruptcy liquidation. This part of the law had already been changed by the 2006 reform.

An important addition concerns a new requirement for admission: the debtor must have kept its accounting in order and the information present in the accounts and other available to the Trustee must allow the establishment of a preliminary list of trade creditors to be submitted to the court. The new reform also clarifies the scope of the court's intervention in the procedure regarding admission, first, and then approval of the arrangement with creditors. It is now clearly provided that, when deciding whether to admit an application for admission of an arrangement with creditors the court cannot exercise any control on the merits of the proposal; furthermore, when approving it, the judge can only assess whether formal requirements provided by the Bankruptcy Act are met and whether the voting majorities have been reached. Such a limitation of the court's powers applies only if no formal opposition against the proposed arrangement has been raised by any creditor or interested party.

The new rule is contrary to the solution that scholars and (of course) the judiciary had supported by way of interpretation of the relevant articles of the revised Bankruptcy Act and is already being criticised because it is too restrictive:

it has been noted that, as it is worded, the law does not appear to grant the bankruptcy court the power to reject the the proposed arrangement plan even in cases when the judicial liquidator will have rendered a negative opinion on the merits of it.

On the other hand, it is worth recalling that the initiative for the proposal had been expressly extended by the 2006 reform to any creditors or third parties (while previously the Bankruptcy Act granted it only to the debtor, although some commentators argued that this should not be construed as a prohibition for any third party to come forward and make a proposal). The enhancement of the role of parties' autonomy and compression of court's influence may increase opportunities for investments in distressed businesses by specialised financing institutions and hedge funds.

Pre-bankruptcy arrangements with creditors

Additional changes to the reformed Bankruptcy Act, which are certainly worth mentioning to international insolvency practitioners, are those brought to the pre-bankruptcy arrangement with creditors procedures.

Firstly, as far as the requirements of the arrangement proposal are concerned, it is now added to the existing conditions that the proposal may provide that secured creditors will not be paid in full, provided that the plan establishes that they will be paid in an amount not less than the one that will be realised and distributed to them, by reason of their preferred status, from the proceeds of the sale, taking into account the market value of the asset or income which constitute the security as determined by the sworn expert or accountant or auditors appointed by the court. The treatment established for each class of creditors shall not alter the order of the preferences determined by the law.

Secondly, another last minute change that will have (hopefully) practical impact is the reduction of the obligation to advance in cash the whole procedural expenses within fifteen days from acceptance of filing of the application for a pre-bankruptcy arrangement with creditors. Especially when big companies are involved, it could be a substantial amount of money to be paid upfront to the court's clerk: in the light of the fact that we are always talking of insolvent or distressed businesses, this obligation amounted to a serious obstacle to access to the pre-bankruptcy arrangement procedure.

It is now provided that the advance must cover only half of the estimated procedure costs, and that the court can also further reduce the amount



to be advanced up to 20%. It is also permitted to invest the cash advanced in financial instruments.

The new regime should help enlarge the attractiveness of the remedy, aimed at saving the business activity and avoiding bankruptcy liquidation.

Lastly, consistently with the increased emphasis on the negotiated nature of the pre-bankruptcy arrangement, the reform establishes that the arrangement can be terminated only as a result of serious breach, pursuant to the general principle in contract law established by article 1455 of the Italian Civil Code.

Restructuring agreements and rescue plans

The Government deemed it necessary to further amend the section of the Bankruptcy Act concerning rescue plans and restructuring agreements with creditors negotiated out of the courts available to undertaking in crisis, but not yet declared bankrupt.

The introduction of a (very limited and still fragmented) legislative framework to this kind of remedies is a brand new one in the Italian insolvency law as it was introduced by the previous Decree Law no. 35 of 2005, as converted by Law no. 80/2005.

Actually, the Bankruptcy Act, as amended by Decree Law no. 35 of 2005, governs rescue plans only in so far as it provides exemption from claw-back actions for acts, payments or securities given on the debtor's assets in implementation of the plan; the plan must be accompanied by a report on the reasonableness and the feasibility of the rescue program prepared and sworn by an expert. The Supplementing Decree clarifies that this professional must possess the same requirements as those that must be possessed by the expert presenting a report on pre-bankruptcy judicial arrangement proposals and debt restructuring arrangements.

It is arguable whether the plan must have been approved by all the creditors to allow the benefit of exemption from claw-back actions.

As another alternative to the pre-bankruptcy arrangement judicial procedure, the debtor may resort to a debt restructuring arrangement stipulated out of the court with creditors representing at least 60% of the total debts. Also this plan must be accompanied by a report on the feasibility of the restructuring plan, namely in relation to payment (timely and in full) of the creditors who are not participating to the arrangement. The plan shall also be endorsed by the court and becomes effective only after its

publication in the Enterprises Registry. If the above conditions are met, exemption from claw-back actions for acts, payments or securities given on the debtor's assets in implementation of the plan shall be granted.

The new Bankruptcy Act, however, does not provide for protection of the debtor from individual enforcement actions by dissenting creditors in the event that one of the above solutions is chosen. The new forms of extra-judicial settlement of insolvency have therefore remained largely ineffective.

The 2007 reform now introduces the possibility that the court grants a moratorium from new and pending individual actions against the debtor pending the deadline for approval of the restructuring plan by the court, but anyway for no more than 60 days from the date of the court order.

Remission of debts

One last amendment which is worth noting concerns the conditions and procedural rules for achieving the remission of debts (only for individuals), which was not possible in Italy until the entry into force of the new Bankruptcy Act in July 2006.

The new rules had created some interpretative difficulties which are now clarified. Namely, it is specified that the effects of the remission of the credits that have not participated to the concursus does not cover the percentage that would have been satisfied in the bankruptcy (i.e. the one that has been allocated at the end of the bankruptcy liquidation to creditors of the same degree).

As far as conditions for obtaining remission and its scope are concerned, it is made clear that the benefit does not extend to the debts that are not related to the business activity, together with maintenance obligations and damages arising from tort.

Obtaining Payment from Debtors who abuse the Protection of Incorporation

Alan D. Lasko & Associates, P.C.

It's not an uncommon scenario. A closely held corporation—let's call it Fishing Ventures, Inc.—has more debt than the owners are able (or willing) to pay. The same or a very similar group of shareholders incorporates a new business—Go Fish, Inc.—that engages in similar activities and uses the same officers and directors. In the alternative, at times, this new company business will purchase the assets of the first business, as



well. As a result, Fishing Ventures' creditors are not paid.

The question for those creditors is, since there is so much overlap between the people involved and the activities of the two companies, will they eventually be paid from the assets of Go Fish or just from what is left of Fishing Ventures?

The answer is, "It depends." Many factors that are discussed here can influence the result.

At some point in a corporation's decline toward too much debt, insolvency, or bank-ruptcy, business owners see the proverbial "handwriting on the wall." For many, this starts as a desperate search for ways to preserve their corporation's remaining assets for their own benefit, instead of distributing them either voluntarily or through court order to the creditors to whom they rightfully belong. Some are tempted to employ strategies that serve their interests and not the creditors.

Among these strategies is use of an "alter ego" scenario. Corporations are entities that are legally separate, both from their owners and shareholders and from other corporations. In certain circumstances, however, the separation may be breached and abused for purposes, most often resulting in not paying creditors. When there is this potentially fraudulent, non-separate relationship between two business entities or between a business and its owners or shareholders, the two can be considered "alter egos." For example, if owners use the business as their own personal piggy bank when the company is insolvent, then they may become liable for the company's corporate debts on the theory that they no longer had a separate legal identity from the company but that the two were actually "alter egos."

Diverting assets and hiding income and ownership are common alter ego scams. These scams are also found in tax evasion and other employee embezzlements. They may involve either actual or constructive fraud. The difference between the two centers around "proof of motive." In actual fraud, the perpetrators intend to use deception as the means for achieving a dishonest purpose (such as taking funds that rightfully belong to a creditor). With constructive fraud, motive is not the central issue. Constructive fraud is a breach of a legal or equitable duty regardless of motive that either causes or takes place when the entity is insolvent.

The challenge for creditors in these cases is to prove that the alter ego—whether an individual owner or officer or another company—is not a separate entity but is, in fact, another identity or manifestation of the debtor.

Most business owners choose to incorporate, primarily as a way to protect their personal assets from liabilities incurred by the business. The corporate form specifically exists for the very purpose of providing shareholders, officers, directors and other corporations with an insulating veil of protection from liability for a corporation's obligations. Shareholder liability is limited to the amount of capital that the shareholders invest in the corporation.

Courts are strongly predisposed not to upset the concept of the corporation as legally different from its officers, board, or owners and from other corporations or business entities.

They require substantial evidence to find that a creditor has the right "to pierce the corporate veil" and thus hold accountable for their misconduct persons or entities that controlled and misused the corporate form.

To pierce the corporate veil, a creditor or other plaintiff must demonstrate a lack of distinction between the debtor corporation and (a) either one or more individuals who own the corporation or (b) another entity (corporation) owned or controlled by the debtor corporation or by its owners. When there are sufficient factors of commonality, the two entities could have an alter ego relationship. Only when a court is satisfied by a preponderance of the evidence that there is a lack of sufficient separation between two entities and/or individuals, will it allow the corporate veil to be pierced.

Breach of fiduciary duties is also looked at when the corporation is insolvent and the stockholders are in effect trustees for its creditors. Some court decisions set out a triple rule: first, that fiduciaries may not pursue an opportunity themselves if their corporation could do so; second, that the questions of whether the corporation could pursue the opportunity must be presented to the corporation... and third, if the fiduciaries actually use the assets of the business to develop the opportunity... Note... When a corporation's fiduciaries actually use corporate assets to pursue a business opportunity, i.e., the new entity, they implicitly assert that the project constitutes a corporate opportunity, and therefore the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation. Any or all of these acts could also be factors in an alter ego analysis.

There are no bright line rules as to when creditors may pierce the corporate veil. Courts look at all the circumstances and facts. Evidence that tends to persuade courts to allow the corporate veil to be pierced include:

- Company officials incurred corporate debt when it was known the company was insolvent.
- Shareholders took unreasonable sums from the corporation, which jeopardized its financial health.
- There had been general commingling of corporate funds or activities with those of one or more individuals who control the corporation.
- There had been no separation of the activities of the controlling shareholder and the activities of the business so that the business is only a facade for the shareholder's activities.
- Funds have been deposited to and withdrawn from the corporation for personal, rather than business, purposes.
- The two businesses share common office space, address, and phone numbers.
- Dealings between the two corporations were not at arm's length, i.e., management fees accrued and never paid.
- Substantially the same customers at roughly the same volume of business.
- Substantially the same vendors at roughly the same volume of business.
- Substantially the same management team structure in place in operating the business.
- Access to and information related to the old business within the new business.
- Assumption of operating leases and related-party leases by the new entity.
- Purchase of assets by the new company from the old company at an only slightly better than 'bargain purchase' type of transaction.
- Issues relating to 'breach of fiduciary duty,' 'duty of loyalty,' 'duty of care' and fiduciary duty to creditors all come into play.

Generally, a creditor will need to retain the services of an accountant to evaluate whether the two entities lack separateness and to present expert testimony to convince a trier of fact that the corporate veil should be pierced.

The alter ego doctrine exists to prevent individuals or corporations from misusing the protection of the corporate form to defraud creditors or engage in other unlawful conduct. Piercing the corporate veil to find an alter ego liable is rare, but it is a remedy creditors may find it necessary to pursue in certain circumstances.

Preliminary Questions concerning the Recognition of other than 'insolvency-related' Judgements

Titia M. Bos, University of Amsterdam (the Netherlands)

The Dutch Supreme Court has submitted preliminary questions to the European Court of Justice (ECJ) on the interpretation of Art. 25 of the European Insolvency Regulation (EIR) in relation with the applicability of the Brussels I Regulation. The questions arose in a dispute between German Graphics Graphische Maschinen GmbH (Germany) and the Receiver in the Dutch insolvency of Holland Binding BV (the Netherlands) and pertain to the claim for surrender of machines that German Graphics had supplied to Holland Binding.

The Case

Holland Binding BV was declared insolvent in the Netherlands on 1 November 2006. Having supplied several machines to Holland Binding under retention of title, German Graphics asked the Landgericht Braunschweig (Germany) to order the Dutch Receiver to surrender the machines. By 'Beschluss' of 5 December 2006 the Landgericht Braunschweig granted this request. Subsequently, on the basis of the Brussels I Regulation (EC-Regulation no. 44/2001, OJ EC 2001, L 12) German Graphics requested the recognition and enforcement of this German 'Beschluss' in the Netherlands.

After the request for enforcement had been treated in two instances by the lower courts in the Netherlands, the case was brought before the Dutch Supreme Court in cassation proceedings. In its judgment of *20 June 2008*, the Supreme Court held that the machines to which the retention of title applies, at the time of the opening of insolvency proceedings were situated in the Netherlands, the Member State of the opening of proceedings against the buyer of the machines (Art. 7 par. 1 EIR). The judgment of the court in Braunschweig was not handed down by a court in the Member State of the opening of the insolvency procedure and thus cannot be deemed to be a judgment as referred to in Art. 16 par. 1 EIR.

The Supreme Court also found that a claim for the surrender of goods delivered subject to retention of title may also be asserted outside insolvency. In other words, the decision of a court on such a claim cannot be regarded as a judgment 'deriving directly from the insolvency proceedings and which are closely linked with them' (Art. 25 par. 1 EIR). And if the Insolvency Regulation does not apply,

would, perhaps, the Brussels I Regulation apply (see also Art. 25 par. 2 EIR)?

The preliminary questions

The key question of the Supreme Court is about the delimitation between the applicability of the Insolvency Regulation and the Brussels I Regulation: which one of these Regulations must be applied?

The Supreme Court has asked the ECJ to explain the applicability of the Brussels I Regulation with regard to judgments *other than* 'judgments deriving directly from the insolvency proceedings and which are closely linked with them' (Art. 25 par. 1 EIR). According to Art. 25 par. 2 EIR, the recognition and enforcement of judgements *other than* these 'judgments deriving directly from the insolvency proceedings' are governed by the Brussels I Regulation, 'provided that that Convention (i.e. Brussels I Regulation) is applicable' (Art. 25 par. 2 EIR). If Art. 1 par. 2 of the Brussels I Regulation, in conjunction with Art. 7 par. 1 EIR must be interpreted such that a claim based on retention of title, asserted by the seller (German Graphics), must be regarded as a claim related to the insolvency – as meant in Art. 1 par. 2 Brussels I Regulation – then the Brussels I Regulation *does not* apply.

By extension, the next question asked was whether it is relevant in this context that, pursuant to Art. 4 par. 2 b EIR, the law of the Member State where the proceeding was opened, determines which assets form part of the estate.

Conclusion

The questions of the Dutch Supreme Court relate to a gap between the Brussels I Regulation and the Insolvency Regulation.

In the case discussed here, after the opening of the insolvency proceeding by the Dutch court on 1 November 2006, the legal effects of the opening also had to be recognised in Germany. Pursuant to Art. 4 par. 2 EIR, Dutch law determines which assets form part of the insolvent company's estate. The provisions in Art. 7 par. 1 EIR result in the applicability of the *lex concursus* (Dutch law) to the question as to the exercise of the rights under the retention of title by the unpaid seller.

On the basis of the EIR (Art. 3 par. 1 in conjunction with Art. 16), the decision of the German court on the claim asserted by the unpaid seller does not qualify for recognition and enforcement in the Netherlands (and the other Member States) because this decision was handed down in Germany by a court other than the court of the Member State of the opening.

However, for the recognition and enforcement in the Netherlands of the German court's decision, applicability of the Brussels I Regulation does not seem obvious either. After all, that Regulation in Art. 1 par. 2 excludes its applicability to insolvency and related proceedings. In so far as the Brussels I Regulation does not apply, one wonders whether the decision on the claim of the unpaid seller should be qualified as a judgment 'deriving directly from the insolvency proceedings and which are closely linked with them', that would be subject to the EIR.

That puzzle now lies before the ECJ in Luxembourg, and its solution will be of highly importance to close the gap between the both Regulations.

The Wooley decision

Victoria Pavlick, Administar Services Group

Balloting occurs. A plan is confirmed, then consummated. Professional fees have been paid. As debtor's counsel, you're in a comfortable position, right? Maybe not. On August 28, 2008, in the case of *Wooley v. Faulkner*, the United States Court of Appeals for the Fifth Circuit ruled that the doctrine of equitable mootness did not prevent it from ordering the disgorgement of a plan administrator's fees even when a plan has been substantially consummated.

In this case, the appellants, John and Jeffrey Wooley, argued that the bankruptcy court erred in ruling that the plan administrator could disburse \$500,000 that had been reserved for them on account of their claims following the equitable subordination of their claims from secured to unsecured. The plan administrator, after seeking and receiving court approval, disbursed the funds to the plan administrator's attorney. Since the claims were subordinated, the court reasoned that it was no longer necessary to reserve funds to satisfy appellants' claims. The district court affirmed the bankruptcy court on appeal.

After deciding in a prior decision that the appellants' secured claims should be fully recognized (i.e., that they should not have been equitably subordinated), the Fifth Circuit considered whether the appellants' allowed secured claims should exceed the \$2,867,600 they had already received in the case and, if so, whether the disbursement of the \$500,000 that was being held in reserve was improper. Appellees argued, among other things, that the court did not have jurisdiction over the appeal because the action was equitably moot.



The doctrine of equitable mootness is a recognition by courts that Chapter 11 proceedings often pass a point of no return after which they cannot order fundamental changes in a debtor's reorganization. This point is often reached after substantial consummation of a plan.

In this case, despite acknowledging that the plan had been substantially consummated, the Fifth Circuit ruled that granting appellants' requested relief would not "unravel the plan" and, therefore, determined that the doctrine of equitable mootness did not apply.

Upon determining that the doctrine of equitable mootness did not prevent its consideration of appellants' underlying appeal, the court held that the bankruptcy court and district court erred in authorizing the disbursement of the reserve funds to pay plan administrator's counsel. The Fifth Circuit remanded the case to the bankruptcy court with instructions to determine the amount of the appellants' remaining secured claim and to order disgorgement of the \$500,000 in reserve funds paid to appellee's counsel.

The Wooley decision raises the specter of when, exactly, a case ends and for how long following confirmation and consummation of a plan an attorney's fees are subject to disgorgement. While equitable mootness is still widely recognized as an applicable doctrine in Chapter 11 cases, it will be worth noting how other jurisdictions react to the *Wooley* decision, if at all.

About the Author *Victoria Pavlick is Executive Vice President – Business Development with Administar Services Group, a leading provider of claims administration services in bankruptcy and class action proceedings.*

Member News

Demetra L. Liggins joins Corporate Reorganization and Creditors' Rights Practice Group of Thompson & Knight LLP

Texas and New York (April 24, 2008) - The global law firm of Thompson & Knight LLP is pleased to announce the expansion of its Corporate Reorganization and Creditors' Rights Practice Group with the addition of Associate Demetra L. Liggins and Staff Associate* Sara Mya Patterson. Liggins will split her time between the Firm's Houston and New York offices, and Patterson is resident in the Firm's Houston office. "We are pleased to have Demetra and Sara join our Practice Group. Our clients will greatly benefit

from their legal talents, strong work ethic, and focus on outstanding client service," says Rhett G. Campbell, the Firm's Corporate Reorganization and Creditors' Rights Practice Leader. Liggins focuses her practice on insolvency and reorganization, including the representation of banks, indenture trustees, secured and unsecured creditors, and acquirers of assets from bankruptcy estates. She has litigated contested matters, adversary proceedings, and plan confirmations. Liggins previously served as a Law Clerk for Honorable U.W. Clemon in the United States District Court for the Northern District of Alabama. She received her J.D., *cum laude*, from Samford University Cumberland School of Law in 2000 and her B.S. in Business Administration, *cum laude*, from Christian Brothers University in 1997.

Patterson joins the Firm after serving as an intern for the U.S. Trustee's Office for the Southern District of Texas, Houston Division. She also previously served as a Judicial Intern for Honorable Marcia A. Crone in the U.S. District Court for the Eastern District of Texas and for Honorable Jeff Bohm in the U.S. Bankruptcy Court for the Southern District of Texas. She received her J.D., *cum laude*, from South Texas College of Law in 2007; an M.A. in Church-State Studies from Baylor University in 2004; and a B.A. in Humanities, *magna cum laude*, from Biola University in 2000.

Not licensed to practice law in the State of Texas. Admission anticipated May 2008.

Carol A. Felicetta announced as stockholder of Reid and Riege

Carol A. Felicetta who is co-chair of the Connecticut Network was elected stockholder in the firm of Reid and Riege on June, 1st 2008.

Andrea Walsh returned to Capstone Advisory Group

Andrea Walsh of the New York Network returned to Capstone Advisory Group after enjoying an extended maternity leave. Ms. Walsh re-joins Capstone in their Valuation Services group and continues to also provide support in their Litigation Services and Restructuring groups.

Peg Anderson now at Fox, Hefter, Swibel, Levin & Carroll, LLP

Margaret M. Anderson recently moved from the Chicago office of Locke Lord Bissell & Liddell to

Fox, Hefter, Swibel, Levin & Carroll, LLP. Additionally, the Norton Journal of Bankruptcy Law and Practice recently published an article she had written: "The Creditor That Is Always There-- The Insurance Company.", 17 J. Bkr. L. & Prac. 4 art. 1.

Sheryl L. Toby elected to ABI Board

Bloomfield Hills, MI, April 29, 2008 — Dykema, a leading national law firm, announced that **Sheryl L. Toby**, co-leader of the firm's Bankruptcy and corporate restructuring practice group, has been elected to the Board of Directors of the American Bankruptcy Institute (ABI). An ABI member since 1986, Toby is a program chair of ABI's Central States Bankruptcy Workshop and has served as a co-chair on ABI's Commercial Fraud Task Force Committee. She will serve a term of three years on the 60-member Board of Directors.



Ms. Toby is known for her approach in providing creative solutions to creditors, debtors and lenders in addressing troubled company situations. Ms. Toby is a frequent national speaker and consultant in her field. She has been recognized by awards such as: Named "Michigan Super Lawyer" in Bankruptcy & Creditor/Debtor Rights by Law & Politics (2007); named in the *Best Lawyers in America 2007* by Woodward and White; in 1999 selected to *Crain's Detroit Business* "40 Under 40" list; in 1999 received honorable mention as one of the country's Outstanding Young Bankruptcy Professionals by Turnaround and Workout Publications; featured in an article in the March 5, 2004 Daily Bankruptcy Review "Mover and Shaker of the Week"; served as chair of the Michigan Network – International Women's Insolvency/Restructuring Confederation and vice chair for the Use and Disposition of Property Subcommittee of the Business Bankruptcy Committee of the American Bar Association.

A resident of Sylvan Lake, Ms. Toby received her B.A. from Michigan State University and her J.D., *cum laude*, from Wayne State University.

About ABI ABI is the largest multi-disciplinary, nonpartisan organization dedicated to research and education on matters related to insolvency. ABI was founded in 1982 to provide Congress and the public with

unbiased analysis of bankruptcy issues. The ABI membership includes nearly 11,700 attorneys, accountants, bankers, judges, professors, lenders, turnaround specialists and other bankruptcy professionals, providing a forum for the exchange of ideas and information. For additional information on ABI, visit www.abiworld.org.

Denise C. Konomidis joined Alan D. Lasko & Associates

Denise C. Konomidis, CPA has joined the firm of Alan D. Lasko & Associates, PC as a Tax Senior. Denise brings her 8 years of experience with respect to Commercial and Individual Income tax work to the firm. Denise will also be specializing with regard to the income tax aspects of workouts, trustee tax issues and other related insolvency tax issues.

Elena Lieskovska assumed new position with Värde Partners

She assumed her new position with Värde Partners, a hedge fund specialized in credit, distressed and special situation investments. There she will be responsible for further development of Värde's European business with emphasis on corporate/single names and will be leading Värde's efforts in building finance platform in emerging markets. Investments will be focused on a range of assets including corporate securities (debt and equity), non-performing loan portfolios and real estate.

Melissa Hager has joined Morrison & Foerster LLP

Melissa A. Hager has joined Morrison & Foerster's Bankruptcy and Restructuring Practice Group in the New York office as Of Counsel. Melissa has extensive experience in all aspects of bankruptcy law, including corporate reorganization, liquidations, out-of-court restructurings and bankruptcy litigation. Her practice includes the representation of creditors' committees, unsecured and secured creditors, and Chapter 11 debtors in complex bankruptcy cases involving a wide spectrum of industries including retail, telecommunications, manufacturing and health care.

She received her J.D. from Quinnipiac University School of Law in 1992.



Network Spotlights

IWIRC's second **Network Chair Retreat** was held in Chicago on July 24 and 25, 2008. It was very well attended and the majority of those in attendance felt that their time was very well spent.

There was a fantastic flow of creative development ideas centered around preserving the best things about IWIRC and its networks and enhancing them to attract future members as well as retain current ones.



Georgia Network

The Georgia Network, along with the Virginia, Florida and Carolinas Networks, co-sponsored a Dessert Reception at the American Bankruptcy Institute's Southeast Regional Bankruptcy Workshop at Amelia Island, Florida. The

Dessert Reception was held after the opening reception on July 16, and was a wonderful opportunity to mix and mingle with the judges, academics and practitioners. This was the fifth year these Networks have co-sponsored an event at the ABI SE and we are looking forward to participating in this wonderful event again next year.

The Georgia Network will soon have its own official pin. We are excited to report that the pins are currently in the "manufacturing" phase and we are looking forward to sporting our new pins at events around town and across the country in an effort to show pride for our Network, and also accomplish a bit of marketing in the process. The Georgia Network has discussed the possibility of starting a pin trend, "pindemonium," and we hope other Networks want to get involved, create their own pins and trade with other Networks around the country and the world.

The Georgia Network's brand new mentoring program is underway. We are still in the initial phase of the new mentoring program, but already, we can see how amazing this effort will be. The Georgia Network's mentoring program will match members looking to mentor and those looking to be "mentored" or both. Our members are in the process of completing a survey that will assist the Network in coordinating mentors and mentees and help us to best utilize our resources to develop this program in its inaugural year. We look forward to sharing more about the mentoring program as it gets off the ground and running in the months to come.

Finally, the Georgia Network would like to thank its sponsors Alston & Bird LLP, Kurtzman Carson Consultants, The Trumbull Group and Trial Graphix for their continued support and generosity. It is clear that the Georgia Network is continuing to grow and succeed on so many levels and we are thankful to our sponsors for helping us realize all of our accomplishments.

Hong Kong Network

2008/2009 is looking to be another great year for IWIRC Hong Kong. In July 2008, with the appointment of the new board, many interesting and diverse activities are planned. The incumbent committee includes Aruni Weerasekera of Alvarez & Marsal Asia Limited, Jacqueline Walsh of Borrelli Walsh and Kelly Naphtali of Lovells as co-chairs, Clarissa Ogden of Allen & Overy as vice chair, Liz Yuen of Borrelli Walsh as treasurer, Lisa Martin of UBS as secretary, Chariya Poopisit of Ferrier Hodgson Limited as speakers committee chair, Elizabeth Wilson of Lucid Issuer Services as events committee chair, Donna Wacker of Clifford Chance and Lauren Oxley of Alvarez & Marsal Asia Limited as general members.

To kick off the year, the Hong Kong Network decided on an event in Shanghai, with INSOL Shanghai providing the perfect opportunity for IWIRC Hong Kong to raise its profile and showcase its success out here in the East by hosting a cocktail party on 15 September 2008. The cocktail reception at **Jean Georges** (a famous Shanghai restaurant/bar) with its view of the Pudong skyline provided a breathtaking setting. The event was open to all INSOL delegates and more and was attended by approximately 50 guests, including IWIRC members from around the world gathered in Shanghai and included a very special guest Selinda Melnik. The evening was made possible by the generosity of IWIRC, Skadden and supported by Lucid Issuer Services.

IWIRC members also took the opportunity while in Shanghai to meet again on 16 September 2008 for a breakfast meeting aimed at getting better acquainted and providing the soon to be established IWIRC Peoples Republic of China (PRC) Network with support and encouragement.

The Hong Kong Network has two further events planned for the coming quarter. Included are a casual *'Welcome back from the Summer'* gathering set for 25 September 2008 followed soon thereafter by an *'Evening of Colour Advice'* at which guests will receive expert advice from Eve Roth Lindsay on using colour in your wardrobe to ensure you look your best in the workplace. The event is scheduled for late October 2008.



The Hong Kong Network currently has 133 Network Members and continues to receive great support. In addition to growing their own network, Hong Kong is also working together with professionals in both Singapore and the PRC to establish new IWIRC networks in these two jurisdictions within the next fiscal year.

We would also like to congratulate some of our board and members on their recent promotions including Kim Boreham (Tanner De Witt) and Kareena Teh (Baker McKenzie) on becoming partners in their respective firms, Kelly Naphtali (Lovells) on her promotion to Consultant and Chariya Poopisit (Ferrier Hodgson Limited) to Associate Director.

Central Ohio Network

In April 2009, the Central Ohio Network will host its second gala event, *Banca Rotta at the Conservatory Deux* in celebration of nearly 15 years as a chartered Network. The gala will be held in The Veridian, at the Franklin Park Conservatory in Columbus, Ohio. Banca Rotta, Latin for "broken bench," is the phrase from which the word bankruptcy is derived. During medieval days, a sign of a merchant's insolvency was his broken stand in the marketplace.

We are looking forward to the gala and are planning for a night of networking and celebration for our members, the bankruptcy bar, Judges, and Court staff. If you are going to be in the Central Ohio area, we hope you will join in the celebration. For more information, please contact, one of our Co-Chairs: Andria M. Beckham (abeckham@bricker.com) or Violyann J. Joseph (violyann_joseph@ohsb.uscourts.gov).

Additionally, the Central Ohio Network recently elected Violyann J. Joseph as a new Co-Chair/Vice President. In order to provide the International



Organization with some information about her, we have included an excerpt from the June 2008 Central Ohio Network Newsletter. Kristin Richner, our outgoing President, has been very instrumental.

For the past year, I have been working as the law clerk for the Honorable Charles M. Caldwell, Chief Judge of the U.S. Bankruptcy Court for the Southern District of Ohio. I have lived in Columbus for 4 years and originally hail from New York, New York. This explains why I am licensed in New York and New Jersey— licensure in Ohio is in my future plans.

After relocating to Columbus, I attended law school at The Ohio State University Moritz College of Law. At Moritz, I participated in the Mentoring @ Moritz and More program, was president of the Caribbean Law Students Association, a mentoring co-chair of the Black Law Students Association, and a managing editor of *The Ohio State Law Journal*. I was also on the Civil Rights Moot Court Team.

Prior to law school, I worked as a paralegal at a small civil litigation firm in New York. I attended college at the State University of New York at Binghamton and majored in Philosophy, Politics, and Law and minored in Economics. I was also very active during my undergraduate years.

I am enjoying my experience at the Bankruptcy Court thus far; it is proving to be invaluable. I am confident that I will feel the same way about working with IWIRC. I thank you for welcoming me into this great organization and thank you for allowing me to serve as a co-chair. - *Violynn J. Joseph, United States Bankruptcy Court*

IWIRC New Members Between April 24, 2008 and September 18, 2008

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Upcoming Events

Northeast Ohio Network – upcoming events

Save the Date! – 12 November 2008 – Full Membership Meeting with Nancy Valentine (Hahn, Loeser & Parks LLP), 200 Public Square, Suite 2800, Cleveland, Ohio 44114 at approximately 6:45 p.m. Spotlight for Meeting: BBP Partners

All Membership Meetings will begin at 5:30 p.m. Members may participate by telephone and call-in instructions will be provided prior to the meeting. There will be dinner afterwards at a location TBA ahead of the meeting. If you would like to present you and your business at the quarterly meeting, please contact Nancy Valentine (navalentine@hahnlaw.com /216.274.2383) or Christine Pierpont (cpierpont@ssd.com/216.479.8686).

Steering Committee Meetings:

September 17, 2008
November 19, 2008

The first three Steering Committee meetings will be held at Squire Sanders & Dempsey LLP at 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114-1304. The last three Steering Committee meetings will be held at Hahn Loeser & Parks LLP at 200 Public Square, Suite 3300, Cleveland, Ohio 44114. All Steering Committee meetings will begin at 12 p.m. with lunch provided. Telephonic access will also be provided by request.