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**Welcome Address**

*Prof Bob Wessels,  
University of Leiden*



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**First Session  
Comparative and  
International  
Insolvency Law**

*Chair: Dr Paul Omar,  
University of Sussex*



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**Crisis Management in  
Russian Companies**

*Prof Alla Bobyleva,  
Moscow State University*



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**Relevant economic trends  
of the last decade**

- Economic growth was observed in few industries while the greater part of Russian economy faced stagnation.
- A great number of poorly managed and, hence, economically inefficient enterprises with the connivance of their shareholders prevented effective inter-industry capital reallocation. Those firms not only show negative Economic Value Added, but also generate no profit.
- According to the State Statistical Agency, the share of loss making organisations peaked in 1998 at the level of 53.2 %, gradually decreasing to 35% (2007).



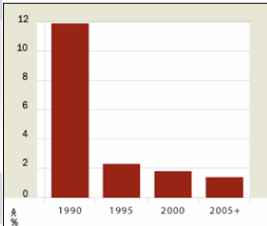
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**Light industry rate in the  
whole structure of industry  
production in Russia**



Year	Rate (%)
1990	11.5
1995	2.5
2000	2.0
2005+	1.5

Source: State Statistical Agency


\*In 2005 – rate in the total processing industry turnover



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## The share of the unprofitable organisations in Russian industry, 1992-2007



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## Legal mechanisms of property rights transmission from less efficient to more efficient owners

- Regulatory framework was set out by the government in early 1990's, but it has not been duly developed so far
- During the last 10-15 years the transmission of property rights occurred in constantly changing legal environment aggravated by law enforcement issues and administrative barriers



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## The major points of bankruptcy law imperfection

- Bankruptcy proceedings is still oriented on subsequent liquidation
- The extremely low level of rehabilitation procedures efficiency
- Using bankruptcy mechanisms for property redistribution
- Self-regulatory organisations are not able to guarantee proper qualification of bankruptcy administrators
- More than 50% of all bankruptcy cases are connected with "missing debtors"



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## Decisions taken under bankruptcy proceedings



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## Using bankruptcy laws for property redistribution

- Russian legal system contains regulations which:
- reduce the price of the takeover,
  - allow a low threshold for liabilities to begin bankruptcy procedure,
  - contain a specific procedure for appointment and control of bankruptcy administrator,
  - give an opportunity of debt repayment by the third parties together with the direct participants of the bankruptcy process,
  - allow asset stripping by means of unfair bankruptcies, etc.

These are the reasons which can explain the fact that the vast majority of our companies are liquidated without real attempts for reorganization during the bankruptcy proceedings.



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## The means of defence against 'unfair' bankruptcy:

- 'conservative' capital structure, the prevalence of internal sources of financing.
- strategic investors are often compelled to form not the control stake of voting shares, but a one close to the absolute.



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## Influence of unfair takeover threats on the development of financial markets and macroeconomics

- Reduction of investments into the country
- Decrease in free floating of shares
- The increase in the issuer's risk, which leads to the underestimation of Russian corporations and hinders their capitalisation growth
- Highly limited disclosure of corporate information intended to minimise the takeover threat creates an unattractive corporate image and causes lack of transparency
- The decrease in efficiency of allocation of natural resources and usage of national wealth
- Property concentration which reduces the opportunities of 'market' acquisition of the inefficient enterprise



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## The key areas to be addressed when dealing with unfair takeovers based on bankruptcy procedures

1. Legislative regulation
2. Enforcement
3. Control over private 'organisations' observance of business standards



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## The major legislation gaps to be bridged

- Finalisation of regulations for the companies regarding large purchases: now they are not enough detailed and transparent.
- To give the shareholders of the organisation under bankruptcy proceedings the primary right to meet the requirements of their creditors.
- Leaving the auction as the only possible mechanism of privatisation (prevent to use transactions with specific non-market conditions).
- Introduction of regulations which exclude the possibility of hearings of corporate disputes by courts of general jurisdiction, expansion of the network of commercial courts.



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## Enforcement and control over private organisations' observance of business standards

The practice of using bankruptcy procedures for unfair takeovers are not always due to drawbacks in legislation – laws are frequently simply broken. With this regard, in our opinion:

- it is necessary to give additional powers to Federal Service on Financial Markets.
- Another possible way – setting up the special supervising body which concentrates on the observance of the rules of fair competition.
- Law enforcement should also be supplemented by a system of non-government organisations oriented on working out business standards, not laws.



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## To sum up:

- In general, our legislation, enforcement and control of the non-government organisations should create conditions in which the fair "civilised" transfer of property rights might cost less in comparison to the unfair transactions. This will gradually eliminate the reasons for unfair bankruptcy.



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## Deficiencies of the Hungarian Insolvency Act and Possible Remedies

*Dr Norbert Csizmasia,  
University Eötvös  
Loránd Budapest*



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## Dual Law for Companies in Financial Distress

*Dr Karin Lutikhuis,  
University of Tilburg*



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# Coffee Break



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## Report on Past Activities 2007-2008

*Dr Paul Omar,  
University of Sussex*



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### Past Projects/Events:

- Monaco Conference  
14 October 2007
- Formation of Mgmt Board/Sup Board
- Website/Publicity/Mailings/ Membership
- Leiden Conference  
5-6 June 2008
- Barcelona Conference  
1-2 October 2008



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### Future Planning/Events:

- Brighton Conference  
23-24 April 2009
- Stockholm Conference  
October 2009
- Book Projects/Conf  
Reports
- Co-Operation with INSOL  
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### What you can do:

- Technical Papers/Books
- Conferences/Workshops



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## Second Session: Comparative and International Insolvency Law

*Chair: Florian Bruder, Max-  
Planck Institute, Hamburg*



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## Priority Issues in Post-Commencement Financing: A View from South Africa

*Prof Kathleen van der  
Linde, University of  
South Africa*



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## Outline

- Effect of commencement
- Financing needs
- Policy considerations
- Issues
- UNCITRAL
- Application of assets
- Evaluation



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## Effects of Commencement

- Administration expenses
- Transfer/encumbrance of assets
- Stay of execution
- Avoidance transactions
- Contracts
- Security rights
  - Enforcement
  - After-acquired assets



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## Financing needs

- Operational expenses
- Preservation of value
- New money?
- Restructuring debt/equity



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## UNCITRAL

- Facilitate financing, provide incentive
- Establish priority over unsecured creditors
- Enable fresh security interests
- Protect existing security rights
  - Exception 1 – agreement
  - Exception 2 – court authority
- Survival upon conversion



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## Policy considerations

### Pro priority

- Efficiency – enhanced returns
- Normative concerns – weaker creditors
- Rescue – social impact

### Contra

- Pari passu
- Vested rights
- Uphold bargains
- Prior in tempore



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## Issues

- Authorisation?
- Which debts?
- Dual capacity creditors?
- Kind of priority – limited assets?
- Internal ranking?
- Third-party assets? (UNCITRAL Secured transactions)



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## Application of Assets in SA

### JM + s435

- Costs of jm (including conduct of company's business)
- (Secured creditors)
- Post-jm in order of incurred
- Pre-jm preferred
- Pre-jm concurrent

### Companies bill

- Administration expenses
- (Secured pre-c creditors)
- Employees (order incurred)
- (Secured post-c creditors)
- Unsecured post-c creditors
- Preferred pre-c creditors
- Concurrent pre-c creditors



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## Evaluation

- Compliance with UNCITRAL guide
- Authorisation?
- Protection of security?
- Classification of debts
- Flexibility
  - All or nothing/automatic
  - Order incurred
- Third party assets?



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## Insolvency Law Developments in China

*Prof Zhang Xianchu,  
University of Hong Kong*



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## Introducing bankruptcy law into PRC

- State-Owned Enterprises Bankruptcy Law of 1986 (on trial basis)
- A highly controversial legislation
- A government controlled mechanism
- An over-simplified design
- A segmented framework



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## Policy guided bankruptcy in China (1994-2008)

- Political difficulties
- Potential financial crisis
- Unemployment pressure and social instability
- Lack of institutional support
- Limited judicial independence and experience
- Fraudulent schemes and corruption



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## Bankruptcy cases handled by the People's Court

- 1989-1991: less than 700
- 1992: 428
- 1993-1996: stable increase
- 1997: 5398
- 1998-2008: 64311

The Supreme People's Court:  
"not a normal situation of a market economy."



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## 2006 Reform

- Long debate for 13 years
- Adoption of the new Enterprise Bankruptcy Law of PRC on August 27, 2006 (effective on June 1, 2007)
- A unified system
- Overhauling the regime



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## The new Bankruptcy Law of 2006

- Scope of application: enterprise legal persons and certain enterprises without legal person status
- New insolvency tests: the liquidity test (unable to repay the debts due) and the balance sheet test (the assets insufficient to repay the debts or apparent lack of capacity to repay the debts)



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- Case acceptance
  - decision within 15 days
  - judicial review of the case
  - appointment of the bankruptcy administrator
  - claim registration
  - automatic stay
  - implication on the debtor



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- Bankruptcy administrator
  - duties and functions
  - report to the People's Court
  - subject to the supervision of the creditors' meeting
  - government officials and professionals
  - fiduciary duty
  - the Supreme Court's rules of 2007



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- Avoidance power
  - transfer without consideration or at unreasonable price: one year
  - unfair preference: 6 months
  - fraudulent transfer or hiding: null and void
  - insiders' embezzlement: recoverable



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- American style of reorganisation
  - early rescue
  - reorganisation application
  - submission of the reorganisation plan
  - approval by different creditors' groups
  - judicial power to "cram down"
  - implementation: "debtor in possession"
  - Creditor-debtor settlement



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- Liquidation and the distribution order
  - priority of the secured properties
  - bankruptcy expenditure and costs of common interest
  - labour claims
  - unpaid taxes and social security
  - general creditors' claims



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### Special protection of employees in bankruptcy process

- Automatic registration of labour claims
- Right to dispute the claims determined by the bankruptcy administrator
- Participating in the creditors' meeting
- Separate voting in reorganisation
- Special priority protection in the transitional period (labour claims before August 27, 2006)



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## Main features of the 2006 Bankruptcy Law

- A uniform system
- More judicial control and adjudication
- Introducing "corporate rescue" culture
- Better creditor protection
- More business autonomy and professional standards
- Special employees' protection



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## Cross-Border insolvency provision

- Art. 5  
A bankruptcy proceeding in China under the Bankruptcy Law shall have legal effects on the assets of the debtor outside the territory of China.  
An effective decision made by a foreign court concerning assets of the debtor in the territory of China may be recognised and enforced by the People's Court based on the party's application



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- The People's Court shall examine the foreign judicial decision according to the international treaties and agreements concerned, or the principle of reciprocity. The foreign decision will be recognised and enforced if it does not violate the basic principles of the law of China, its national sovereignty and social public interest, and is not harmful to the lawful interest of the creditors within China.



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## Judicial Practice on Cross-border insolvency

- BCCI(1991): a territorial approach
- B & T(2000): recognised an Italian bankruptcy judgment according to Sino-Italian Treaty on judicial assistance
- CCITC (1999-2000): a universal approach
- Pellis Corium "P.E.L.C.O.R" (2005): recognized a French insolvency judgment according to the Sino - French treaty on judicial assistance.



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## Unsolved issues

- Personal bankruptcy
- Financial institutional bankruptcy
- Continuing dual track practice



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## Challenges in implementation

- Detailed rules needed
- Coherence with other legislations
- Judicial competence
- Local protectionism
- Development of market discipline and trust/good faith business culture



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**Special briefing on  
the ALI-III Project  
on Global Principles  
in Insolvency Law**

*Prof Bob Wessels,  
University of Leiden,  
Joint Project Chair*



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***Comfort  
Break***



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**Management  
Meeting**

*Management and  
Supervisory Board  
Members*



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