

Insolvency and Restructuring International

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the global voice of
the legal profession

Evolution of the Italian
restructuring framework

Foreign bankruptcies
in Switzerland

Russia: cryptocurrency and
bankruptcy estate

CONTENTS

Vol 12 ISSUE 2 September 2018

FEATURE ARTICLES

6

NIKI: testing the new Article 3 Paragraph 1 EIR

Christoph G Paulus

9

Recent evolution of the Italian restructuring framework

Lorenzo Pietromarchi

13

Case study of a Dismissal of a Chapter 11 Proceeding in favour of a pre-existing Foreign Proceeding

Eric D Schwartz and Sara Toscano

15

Foreign bankruptcies in Switzerland

Beat Mumenthaler and Louis de Mestral

19

Guarantors under Bankruptcy Code: the curious case of confusing precedents

Sahil Kanuga and Arjun Gupta

24

France – quo vadis?

Anja Droege Gagnier and Amélie Dorst

28

The new Dutch scheme: restructuring instrument of the future?

Thomas Bil

31

Russia: cryptocurrency and bankruptcy estate

Sergey Treshchev and Elena Malevich

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From the Co-Chairs 3
Richard J Mason and Kirsten Schümann-Kleber

From the Co-Editors 4
Matteo Bazzani and Gottfried Gassner

REPORTS

UNCITRAL rejects comity for judgments, embraces universalism for groups 33

Report from the Reorganisation and Workouts Subcommittee 36

Report from the Insolvent Financial Institutions Subcommittee 37

Report from the Creditors' Rights Subcommittee 37

Guidelines for contributors 41

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Russia: cryptocurrency and bankruptcy estate

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Introduction

Under Russian insolvency laws, the trustees – or in the case of insolvency of individual debtors, the so-called financial managers – face various difficulties while collecting the bankruptcy estate. A recent phenomenon in that regard is whether cryptocurrency should form part of the bankruptcy estate. Recent court cases show no clear picture.

General legal framework

Generally, according to Article 131 (1) of Federal Law No 127-FZ dated 26 October 2002 ‘On Insolvency (Bankruptcy)’ (the ‘Bankruptcy Law’) all debtor’s property available at the time of opening the procedure and revealed during bankruptcy proceedings constitutes the bankruptcy estate.

To properly register the assets of a debtor, which form the bankruptcy estate, the trustee/financial manager has the right to contract accountants, auditors and other experts.

The bankruptcy estate usually comprises: (1) fixed and circulating assets; (2) intangible assets; (3) receivables; and (4) other assets fixed in the balance sheets of the debtor.

The Bankruptcy Law also specifies some types of assets that do not fall within the categories of assets forming the bankruptcy estate; such assets are subject to a special procedure of transfer from the debtor to the relevant third parties, including:

- assets that are non-marketable or limited in their transferability (eg, objects of seaport infrastructure);
- socially significant facilities and cultural heritage objects;
- social housing facilities;
- non-assignable property rights connected with the personality of the debtor (eg, rights to licences to conduct particular activities);
- in the event of the bankruptcy of a professional securities market participant, assets of its clients;
- pension savings and pension reserves of private pension funds;

- mortgage collateral securing obligations of the issuer of mortgage-backed securities;
- in the event of a bankruptcy of an individual, his or her assets in relation to which execution cannot be levied (eg, the sole living premises (if not mortgaged) and household articles);
- in the event of a bankruptcy of a farm, any property owned by the head or members of the farm household or in relation to which it can be proven that such property was not acquired using funds of the farm household; and
- assets of compensation funds of self-regulating organisations.

Disputes about forming the bankruptcy estate, in particular, and therefore, disputes about whether certain assets fall into the bankruptcy estate, are resolved in the state commercial courts.

Recent court cases dealing with cryptocurrency in bankruptcy

Recently, a new problem has been observed in relation to forming the bankruptcy estate: the treatment of cryptocurrency held by individuals.

Not very surprisingly, the Bankruptcy Law does not deal (yet) expressly with cryptocurrency in relation to the bankruptcy estate.

The State commercial courts already had to deal with and review aspects related to the use of cryptocurrency in bankruptcy; however, the courts were not required to decide and have not yet clarified if cryptocurrency could be considered as an asset under Russian law.

In one of the cases, a debtor filed for bankruptcy proceedings to avoid payment of debts originated by the unsuccessful mining of cryptocurrency. The judge rejected the petition on voluntary bankruptcy and stated that the individual debtor had acted in bad faith because this debtor had intentionally increased the outstanding obligations by performing transactions with cryptocurrency whose official use was not regulated in the Russian Federation (State Commercial Court of the Tyumen Region, case No

A70-15360/2015). The court of appeal, however, found that there was not sufficient evidence on the bad faith behaviour of the debtor and referred the ruling back to the court of the first instance.

In a second case, the court decided to oblige the individual debtor to provide the financial manager with documents on transactions with cryptocurrency, with the purpose of evaluating the financial state of that debtor (State Commercial Court of the Volgograd Region in case No A13-15648/2015).

Finally, the most recent case resolved in Moscow attracted the attention of the community of insolvency practitioners in Russia because the judges ruled on the question of whether cryptocurrency could be considered as an asset to form a bankruptcy estate.

The dispute was initiated at the Moscow City State Commercial Court (case No A40-124668/2017) as the court of the first instance. The financial manager of an individual debtor claimed in court to include cryptocurrency in the bankruptcy estate.

The debtor objected against the claim, referring to the uncertain legal status of cryptocurrency in Russia. The Moscow City State Commercial Court followed the arguments of the defendant and rejected the claim of the financial manager. The judge justified the ruling by referring to Article 131 of the Bankruptcy Law and held that 'based on a direct interpretation of the rules of law', cryptocurrency cannot be qualified as an object of civil rights. The court also noted that cryptocurrency is beyond the legal field in Russia and the compulsory force of cryptocurrency transactions are not secured by the State.

The judge also indicated that the anonymity of users of cryptocurrency does not permit the definition with certainty of the beneficial owner of cryptocurrency; the cryptocurrency of the debtor, therefore, which had been revealed by the financial manager, was not subject to be included in the bankruptcy estate of the individual debtor.

The financial manager, of course, disagreed with the ruling and filed an appeal with the Ninth Commercial Court of Appeal (the 'Court of Appeal'). Very interestingly, the Court of Appeal indeed took

the opposite view on this dispute and ruled to include cryptocurrency into the debtor's bankruptcy estate.

In this decision, the Court of Appeal held that Russian law does not provide for an exhaustive list of objects of civil rights. Taking into account the rapid level of development of information technology, the Court of Appeal considered it possible to broadly interpret the definition of objects of civil rights and ordered the debtor to transfer the password to the financial manager for access to the crypto-cartwheel to replenish the bankruptcy estate.

It was the first court ruling in Russia acknowledging cryptocurrency as an asset that can be included in the debtor's bankruptcy estate.

We consider the outcome of the dispute as very positive. The Court of Appeal drew the important conclusion that the lack of special regulation of cryptocurrency does not exclude the applicability of general principles of civil law. We will follow the further development of that trend in Russia; we believe, however, that until laws on digital assets are amended, transactions with cryptocurrency in Russia will remain risky, and their status in bankruptcy proceedings remains unclear.

Sergey Treshchev is a partner and Head of the Dispute Resolution, Insolvency & Restructuring Practice at Squire Patton Boggs, Moscow. He has advised and represented Russian and foreign clients in insolvency and restructuring proceedings involving banks, pharmaceutical companies, gas servicing enterprises and retail companies. He has represented Russian and foreign clients at state commercial courts, IP court, Court of the Eurasian Economic Community and courts of general jurisdiction. He can be contacted at sergey.treshchev@squirepb.com

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Report from the Insolvent Financial Institutions Subcommittee

Sergey Treshchev

Squire Patton Boggs, Moscow

The Insolvent Financial Institutions Subcommittee (the 'Subcommittee') paid serious attention and contributed to both the organisation of the 24th Annual IBA Global Insolvency and Restructuring Conference in Amsterdam and preparation of the Insolvency Section's presentations at the IBA Annual Conference 2018 in Rome. Several conference calls were held to discuss the agenda and specific topics, and select and recommend speakers. In particular, intensive discussions were held with respect to the Clash of Cultures topic. As a result, the Subcommittee has put aside the idea of covering the 'UNIDROIT' topic (A new Protocol of the Cape Town Convention on International

Interests on Mobile Equipment) and chosen other more relevant issues for discussion.

Representatives of the Subcommittee took part in the Insolvency Section's officers meeting, which summarised the results of the previous IBA Annual Conference and preparation for the Amsterdam Conference and the IBA Annual Conference 2018 in Rome, and approved important decisions to strengthen the Section's role in the IBA and externally.

Finally, representatives of the Subcommittee are also active in providing articles for this magazine.

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Report from the Creditors' Rights Subcommittee

Pedro Arregui

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24th Annual IBA Global Insolvency and Restructuring Conference, May 2018, Amsterdam, the Netherlands

During the last Insolvency Section mid-term conference, the Creditors' Rights Subcommittee (CRS) presented a panel on 'The long arm of insolvency proceedings: on extraterritorial reach of domestic avoidance provisions'.

Andreas Bauer of GSK Stockmann, Munich and Sarah L Cave of Hughes Hubbard & Reed, New York moderated the panel and introduced the panellists.

The panel consisted of Leonard H Gilbert of Holland & Knight, Tampa and World Bank Liaison Officer; Professor Bruce A Markell of Northwestern

Pritzker School of Law, Chicago; Thomas Rohner of Pestalozzi Attorneys at Law, Zurich; Yuri Sugano of Nishimura Asahi, Tokyo; and Luciana Tornovsky of Demarest Advogados, São Paulo.

After presenting an overview of the subject, the panellists followed with suggested approaches regarding the extraterritorial reach of domestic avoidance provisions and presented several cases to foster discussion about the treatment of inbound and outbound avoidance actions. The panellists then focused on the connection required between recommendations 87 to 99 of the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide.

After a short coffee break, the discussion continued with a focus on future lines of regulations regarding