The Restructuring Review

Seventh Edition

Editor
Christopher Mallon

Law Business Research

The Restructuring Review

The Restructuring Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The Restructuring Review - Edition 7
(published in August 2014 – editor Christopher Mallon).

For further information please email
Nick.Barette@lbresearch.com

The Restructuring Review

Seventh Edition

Editor
Christopher Mallon

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Jo Morley

SUBEDITOR
Anna Andreoli

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-17-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

AKINWUNMI & BUSARI LEGAL PRACTITIONERS

ASTREA

BAKER & McKENZIE

BÄR & KARRER AG

CASTRÉN & SNELLMAN ATTORNEYS LTD

CHARLES ADAMS RITCHIE & DUCKWORTH

CLIFFORD CHANCE

CMS CAMERON MCKENNA LLP

DHIR & DHIR ASSOCIATES,
ADVOCATES & SOLICITORS

FASKEN MARTINEAU

GARRIGUES

GILBERT + TOBIN

GRIMALDI STUDIO LEGALE

KIM & CHANG

KVALE ADVOKATFIRMA DA

LEONHARDT RATTUNDE

LINKLATERS LLP

MORAIS LEITÃO, GALVÃO TELES,
SOARES DA SILVA & ASSOCIADOS

MOTIEKA & AUDZEVIČIUS

OPF PARTNERS

RITCH, MUELLER, HEATHER Y NICOLAU SC

RØNNE & LUNDGREN

ROSCHIER ADVOKATBYRÅ AB

SHEARN DELAMORE & CO

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

SOARES BUMACHAR CHAGAS
BARROS ADVOGADOS

WILLIAM FRY

WOLF THEISS ATTORNEYS-AT-LAW

CONTENTS

EDITOR'S PREFACE

I am very pleased to present this seventh edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2014 and 2015 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In many jurisdictions the general economic trends are now more positive than they have been for many years. Against this background, the trend of diminished large-scale restructuring activity has continued in many markets. This picture may suggest a global economy in robust health after the long and difficult years of recession but it would be naïve to think that stability has returned for the long term as several warning signs remain.

First, the dramatic growth of high-yield issuances of past years may lead to unknown consequences further down the road. In the United States, 2012 and 2013 were each record years for high-yield issuance, and across the Atlantic this market is finally achieving a similar stage of development. At the time of writing, total European high-yield issuances for 2014 had already surpassed the annual totals for every year before 2013, and Credit Suisse was forecasting a record level of issuances for the year. As has happened in the past, it is inevitable that such large increases in economic activity will include inappropriate or unfortunate deals, the effects of which will need to be unpicked in future years with the help of restructuring professionals. The same will no doubt apply to the surge in M&A activity that has recently been observed in many developed economies.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and when interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, and taking into account also the stresses that continue to lie beneath the surface in the eurozone and some worrying signs of instability in the emerging economies, only the very brave would forecast a prolonged period of calm for the global economy. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this Review would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2014

Chapter 23

RUSSIA

Vladimir Barbolin and Adam Fadian[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Russian economy is slowing and is widely regarded as being on the brink of recession. This slowdown has been exacerbated by the recent events in Ukraine and the sanctions imposed by, *inter alia*, the United States and the European Union. The uncertainty surrounding these events, as well as the threat of possible further sanctions, has contributed to a capital flight from Russia (totalling US$68 billion in the first four months of 2014, more than for the whole of 2013) and limited Russian companies' access to foreign debt markets. In its recent report, Fitch Ratings stated that this market-led rationing of capital was the most immediate threat to the Russian corporate sector to emerge from the events in Ukraine, but on the whole, Russian companies have fairly robust financial profiles and would have sufficient liquidity to withstand a complete closure of the refinancing market for the remainder of 2014.[2] A contributing factor to this robust financial position has been the favourable conditions in the lending market that existed throughout 2013, which prompted many companies to address their financing needs at that time, thereby reducing the need for refinancing in 2014.

It remains unclear the extent to which these macroeconomic and geopolitical headwinds will impact the level of restructuring and insolvency activity in 2014. According to statistics published by Euler Hermes, the number of corporate insolvencies in Russia is expected to increase by 2 per cent in 2014 and remain flat in 2015.[3] With

1 Vladimir Barbolin and Adam Fadian are counsels at Clifford Chance.

2 'Russian Corporate Liquidity Mitigates Capital Flight Risk', published on 16 April 2014 at https://www.fitchratings.com.

3 Economic Outlook No. 1207, 'Insolvency World Cup 2014: Who will score fewer insolvencies?' May 2014, published at www.eulerhermes.com.

the exception of Amurmetal, the largest steel producer in the Russian far east, the vast majority of recent insolvency activity has been in respect of small to medium-sized companies and it is expected that this trend will continue.

In terms of restructurings, some companies (such as certain companies in the metals sector) have never really emerged from restructuring since the 2008 crisis, while others (such as certain companies in the real estate sector) emerged only recently. The majority of recent restructuring activity has been seen in the metals and mining sector, with depressed commodity prices and heavy debt burdens prompting some of the major players to return to their creditors with requests to restructure their debts and/or extend maturities. The most notable development in the Russian restructuring market is the reported attempt by Rusal, the world's largest aluminium producer, seeking to implement its restructuring via English and Jersey law schemes of arrangement (described in further detail below); this is unprecedented in the Russian market.

As was the case with the wave of restructurings in 2008, the trend continues to be for these restructurings to occur consensually and outside of formal insolvency proceedings, often commencing with a formal stand-still or forbearance period, and with a focus on assets sales as a means of raising funds that can be applied to reduce debt. One key difference between 2008 and the current environment is that, based on public statements by government officials, there appears to be less willingness on the part of the government to provide bails-outs to privately owned companies. It remains to be seen to what extent these statements will translate into government policy.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

There is no statutory regime for restructuring a company's debts outside formal insolvency proceedings, and no US Chapter 11-equivalent protection. Under Russian law, 'stand-still agreements' and other similar arrangements introducing a moratorium on enforcement of creditors' claims and security against a Russian debtor, which may be available in other jurisdictions for the purposes of facilitating a restructuring, most likely would not be enforceable in Russia, unless the terms of each relevant agreement under which the relevant debt obligations have arisen are amended.

Most of the legislation regulating the insolvency of corporate entities in Russia is contained in the Federal Law No. 127-FZ on insolvency of 26 October 2002 (the Insolvency Law), which was significantly amended at the end of 2008 and in the middle of 2009. The details of the insolvency process of credit organisations are regulated by a special Law on Insolvency of Credit Organisations, and there have been various clarifications from the Russian Supreme Arbitrazh Court on the application of insolvency legislation.

i Insolvency proceedings

Insolvency hearings take place before the local arbitrazh court (the insolvency court) in the area in which the company is registered, but decisions of that court may be appealed in courts of higher instance. There are generally five possible stages of insolvency proceedings that may be applied against a Russian company.

Supervision is the first compulsory insolvency stage, which can last up to seven months, and involves the appointment by the insolvency court of an interim administrator whose primary aim is to preserve the company's assets while conducting a financial audit of the company to determine whether the company may be restored to solvency. During the period of supervision, certain restrictions are imposed with respect to creditors' rights to take enforcement action against the company and the company's ability to discharge certain claims. Most of these restrictions also extend to the other stages of insolvency described below.

The interim administrator is approved by the insolvency court following nomination by the petitioner or by selection from a list of candidates presented by the self-regulatory organisation of insolvency administrators (SRO) proposed by the petitioner in its insolvency petition. During the supervision stage the company's management remains in place (although with restricted authority) and the first creditors' meeting must be held, which, *inter alia*, should decide on the next stage of insolvency to which the company will move upon the direction of the court after completion of supervision.

The second stage concerns possible financial rehabilitation and is primarily aimed at restoring the company's solvency and the satisfaction of creditors' claims in accordance with a debt repayment schedule. Financial rehabilitation is not a compulsory insolvency proceeding but is instigated by the insolvency court at the petition of either the first creditors' meeting or, in the absence of such petition, of the company's shareholders or other persons willing to put up collateral for the company's debts.

In the course of rehabilitation a debt repayment schedule must be drawn up under which all registered claims are to be satisfied according to the statutory order of priority no later than one month prior to the end of the stage, and first and second-ranked claims are to be satisfied within six months of the date of commencement of rehabilitation.

If financial rehabilitation is successful, the company emerges from the insolvency proceedings; if not, the insolvency court will move to liquidation unless, to the extent the length of financial rehabilitation allows, there are grounds to move to the external administration described below. Implementation of the debt repayment schedule and the plan for financial rehabilitation (which is drawn up if collateral supporting the debt repayment schedule was not provided) is supervised by an administrator that is approved by the insolvency court following nomination by the creditors' committee or selection from a list of candidates presented by the SRO proposed by the creditors' committee; but again, the company's management remains in place (although its authority is more restricted than at the supervision stage).

Financial rehabilitation can last up to two years.

The third stage, external administration, is not a compulsory insolvency proceeding and is generally instigated by the insolvency court at the petition of the creditors' meeting. It involves the appointment of an external administrator to collect debts, make an inventory of assets and prepare a plan for restoring solvency (to be approved by a majority of creditors voting at a creditors' meeting).

External administration commences if there is a real possibility of restoring the company's solvency within the set time limits, and if following financial rehabilitation it may only be commenced if no more than 18 months have passed since its commencement.

The company's management is removed by the insolvency court and management power is vested in the external administrator. An external administrator is approved by the insolvency court by the same procedure as that applicable to financial rehabilitation.

Subject to a limitation on the aggregate duration of financial rehabilitation and external administration mentioned, external administration can last up to 18 months but may be extended by a further six months on the petition of the majority of registered creditors voting at a creditors' meeting.

Liquidation is the final stage of formal insolvency proceedings. A Russian company may generally enter into liquidation if the insolvency court determines that the company shows 'signs of insolvency' and there are no grounds to (1) instigate any recovery stages of insolvency (i.e., financial rehabilitation and external administration); (2) approve a voluntary arrangement; or (3) terminate insolvency proceedings or dismiss an insolvency petition.

In addition, the company may enter into liquidation if the creditors' meeting:

a petitions at any stage of insolvency to have the company declared bankrupt and for the commencement of liquidation;

b fails to approve the solvency plan within four months of the date of commencement of external administration;

c rejects the solvency plan and petitions for liquidation; or

d on the basis of the report of the external administrator, fails to take either a decision resulting in termination of insolvency proceedings or a decision on commencement of liquidation, if the insolvency court was (1) petitioned for commencement of liquidation and (2) the maximum time limit for external administration has expired.

Liquidation starts by declaring the company bankrupt and involves the appointment by the insolvency court of a liquidator to realise the company's assets and satisfy its debts in accordance with the statutory order of priorities. The liquidator is approved by the insolvency court by the same procedure as that applicable to the administrator in financial rehabilitation and replaces the management of the company.

Upon commencement of liquidation, all debts are deemed due, all assets are consolidated in a pool comprising the bankrupt estate (although secured assets are accounted for separately within the pool) and all bank accounts are consolidated into a single account except for a 'special account' to be established for the purposes of collecting proceeds from the sale of secured property and the accounts pledged in favour of secured creditors.

Voluntary arrangements can be entered into at any stage of insolvency proceedings. A voluntary arrangement is a court-sanctioned agreement pursuant to which a company may exit insolvency proceedings.

The creditors' meeting can petition for a voluntary arrangement upon approval by a majority of creditors whose claims are included in the register of creditors, and with the unanimous consent of those creditors whose claims are secured by pledge or mortgage over the debtor's assets.

To be legally binding, a voluntary arrangement must be approved by the insolvency court and the court may approve it only if it satisfies the unsecured claims of the first and second-ranked creditors and current claims.

A voluntary arrangement binds the company and the creditors whose claims were included in the register of creditors (irrespective of whether they voted against such arrangement or did not vote). From the date of court approval of the voluntary arrangement, the insolvency proceedings terminate and the debtor is obliged to start repayment of creditors' claims in accordance with the repayment schedule set out in the voluntary arrangement.

Existing security (in fact, only pledges or mortgages) over the debtor's assets is retained to secure claims of secured creditors under the voluntary arrangement, unless otherwise provided in the voluntary arrangement.

Effects of insolvency

Once insolvency proceedings are commenced (i.e., the supervision stage has been instigated) the insolvent company can only discharge its non-current debts (claims that arose before the opening of insolvency proceedings) in accordance with the statutory order of priorities. In particular, upon instigation of supervision:

a creditors' claims other than current claims (i.e., claims that arose after the opening of insolvency proceedings) may be presented only in accordance with the procedure prescribed by law;

b for the purposes of participation in insolvency proceedings and inclusion of creditors' claims in the register, claims that arose on or before the acceptance by the insolvency court of a insolvency petition are deemed automatically due and payable;

c any debt recovery proceedings and steps to enforce against the company's assets are suspended (except where enforcement is sought under enforcement orders for employment claims, claims for harm inflicted to health or life, claims for moral damages (mental suffering), claims for recovery of property from the debtor's unlawful possession and certain other claims);

d all claims for the purposes of inclusion in the register of creditors' claims are converted into roubles at the exchange rate set by the Russian Central Bank at the date of commencement of the insolvency stage following the maturity of such claim;

e set-off against the debtor's claims is prohibited if it would breach the statutory order of priority, or such discharge results in the preferential satisfaction of claims of one creditor over another;

f any contractual subordination in respect of a claim against an insolvent Russian company is unlikely to be effective; and

g any payment of dividends to shareholders and other payments to holders of issued securities is prohibited.

Creditors' meeting

Creditors have a say on the key matters concerning the insolvency process by participating in the creditors' meetings. Generally the creditors' meeting has exclusive competence on matters including:

a approval of additional criteria for nominees for the positions of insolvency administrator at different stages of insolvency;

b approval of any voluntary arrangement to be submitted to the court; and *c* determining what would be the next stages of insolvency (i.e., either to petition the court to declare the company bankrupt and commence liquidation or to proceed with pre-liquidation insolvency proceedings that may end up with the restoration of solvency of the company and termination of insolvency proceedings).

Creditors vote at the creditors' meeting in proportion to their registered claims (in each case, excluding the amount of any claim for fines, penalty interest, damages and other financial sanctions). Decisions are generally adopted by a simple majority of votes of creditors attending the meeting (provided that at least half of the registered creditors by claims were present at such meeting), although decisions on certain matters must be adopted by a majority of the total number of registered votes (e.g., on commencement of further stages of insolvency and extension of the term of such stages, on conclusion of a voluntary arrangement).

The decision of the majority creditors will be binding on the minority creditors but the company cannot influence any such decision, and in this sense no true 'cram down' is available. The validity of decisions can be challenged in a court.

Satisfaction of creditors' claims in insolvency

Unsecured claims

At the liquidation stage (where all creditors' claims are subject to satisfaction), the satisfaction of unsecured monetary claims against the insolvent company is generally subject to the following statutory order of priority:

a claims for harm to health or life and claims for moral damages (mental suffering);

b employment claims (wages and severance payments) and royalty claims under copyright agreements; and

c all other claims, including claims of secured creditors to the extent their claims are not discharged out of the proceeds of sale of secured assets or the value at which the secured assets were appropriated by the secured creditor.

Settlement of claims in the foregoing order of priority is conducted in accordance with the register of creditors' claims and claims submitted after the closing of the register of creditors are satisfied only after the discharge of all registered claims.

Shareholders' claims

Generally, shareholders with shareholder loans are treated as other creditors. Equity claims of shareholders may not, however, be satisfied in insolvency proceedings and may be satisfied only upon liquidation of a company if any assets remain after all creditors have been paid in full.

ii Taking and enforcement of security

The Insolvency Law expressly recognises only a pledge or mortgage as giving the holder the status of a secured creditor and it is therefore unclear what status, if any, would be afforded by other forms of security.

Claims of secured creditors

Claims secured by a pledge or mortgage over the company's assets are settled out of the proceeds of sale of such assets in priority to all other claims, subject to a requirement to allocate part (20 to 30 per cent, depending on the nature of the claim secured) of the proceeds to discharge claims with statutory priority of the first and second ranks, and certain current claims.

The secured property is generally subject to a sale at the auction. If two auctions fail and the property is not sold, the secured creditor may elect to appropriate the secured property, in which case it must transfer 20 or 30 per cent, as appropriate, of the value of the property at which it was appropriated, to the 'special account' for the purposes of satisfaction of the above statutorily prioritised claims. If the secured creditor does not appropriate secured property, the pledge terminates.

To the extent unsecured claims with statutory priority of the first and second ranks are satisfied, the remaining proceeds of sale of the secured property are paid to the secured creditors. If the secured claim is discharged in full, the remaining proceeds are routed to satisfaction of outstanding current claims and the balance is channelled towards the discharge of third-ranked creditors' claims.

Voting rights of secured creditors

Under the Insolvency Law, secured creditors have been expressly granted a right to vote at a creditors' meeting during:

a supervision; and

b financial rehabilitation and external administration, if the secured creditor decided against the sale of secured property during these stages or if the insolvency court rejects the sale of secured property on the enforcement of the relevant pledge or mortgage.

Secured creditors that do not have a voting right can still participate in, and speak at creditors' meetings.

Based on the clarifications of the Russian Supreme Arbitrazh Court, secured creditors still have voting rights with respect to voluntary arrangements (where a unanimous vote of all secured creditors is required) at the liquidation stage (where, generally, secured creditors do not have voting rights) and arguably at the earlier stages of insolvency when the secured creditors generally do not have voting rights (i.e., when their right to enforce security was not rejected or they have not refused to enforce it).

iii Duties of directors of companies in financial difficulties

The Insolvency Law imposes a general duty on a company's CEO to act in accordance with the Insolvency Law, e.g., to follow the rules on satisfaction of creditors' claim, comply with moratorium, etc. In addition, as of 1 September 2014 the Russian Civil Code will be amended to introduce a direct statutory obligation on directors to act reasonably in the best interest of the company. This would be the first time such obligation is directly provided for by Russian corporate legislation, although the Russian court practice has been following such approach for a number of years.

Liability

Management and shareholders' liability

Liability of 'controlling persons'[4] (including directors) and its shareholders in the event of a company's insolvency are regulated by a number of Russian laws. Depending on the type of action and its gravity, a director may be subject to civil, administrative or criminal liability.

Civil liability

If insolvency of a company is caused by the shareholders (participants) or other persons who have the right to give binding instructions to such company or otherwise are able to determine the actions of the company, such persons can bear subsidiary liability for the company's obligations if the assets of the company are insufficient to discharge the debtor's obligations. Apart from limited liability companies in relation to which the liability of controlling persons is not restricted by any subjective test, the scope of the potential liability of controlling persons with respect to joint stock companies is restricted to situations in which such controlling persons have used their right to give binding instructions, or used their influence, to determine the actions of the company for the purpose of the company taking an action, knowing in advance that such action would entail the company's insolvency.

Liability of controlling persons

In addition to the general liability envisaged by civil legislation, the Insolvency Law sets out the specific grounds and the level of liability of the company's management, shareholders and other controlling persons for the company's debts.

The shareholder and management, as well as other 'controlling persons', of a Russian debtor that was declared bankrupt could jointly and severally bear secondary liability for the monetary claims of creditors (including current claims) against, and mandatory payments due from, such debtor, when simultaneously:

a the insolvent debtor has acted on instructions from the controlling persons;
b such actions resulted in a 'harm to creditors' rights'; and
c the insolvency estate is insufficient to satisfy the creditors' claims, mandatory payments and current claims.

4 For the purposes of the insolvency legislation a controlling person means a person who, within the two years prior to the commencement of insolvency proceedings, has or had the right to give binding instructions to the debtor or otherwise is or was able to determine the debtor's actions. The Insolvency Law expressly provides that 'controlling persons' include (1) members of the debtor's liquidation commission; (2) the debtor's authorised representatives (whether authorised by virtue of a power of attorney, regulation or special authorisation); and (3) persons (entities) that had the right 'to dispose of 50 per cent. or more' of the voting shares (in the case of a joint stock company) or more than 50 per cent. of participatory interest (in the case of a limited liability company).

Russian courts may, at their discretion, reduce the liability of controlling persons if the losses caused by the debtor acting on the controlling persons' instructions are disproportionately lower than the amounts claimed by the creditors. Furthermore, controlling persons are exempt from liability if they can prove that they acted in good faith and reasonably in the interests of the debtor.

In a situation in which the accounting or reporting documentation of the debtor that is required to be produced by Russian law appears to be missing, or the relevant information on the assets and liabilities of the debtor and their movement appears to be incomplete or untrue, in each case as of the date of instigation of the supervision stage or declaration of the debtor's insolvency, the chief executive officer (CEO) of the debtor also bears secondary liability for the obligations of the debtor.

In addition to the above, the persons (generally, the CEO and a liquidator, as appropriate) who failed to file for the company's insolvency when were obliged to do so by law (e.g., in case a company meets certain insolvency tests), may bear secondary liability for new debts of the company arising after the date on which the insolvency petition should have been filed.

Administrative and criminal liability

A CEO or founders of a company may face criminal or administrative liability for such acts as fraudulent insolvency, deliberate insolvency, concealing property during insolvency proceedings, unlawful satisfaction of creditors' claims, etc.

iv Clawback actions

In addition to certain transactions that are prohibited or restricted at each stage of insolvency and that, if entered into in violation of such restrictions, may be challenged by an insolvency administrator, there are specific transactions that may be challenged in insolvency if entered into during suspect periods prior to the opening of insolvency proceedings.

Generally, the following two specific types of transaction can be challenged by an insolvency administrator in the insolvency court at the stage of external administration or liquidation:

a 'suspicious' transactions, which include transactions 'at an undervalue' and transactions 'aimed at defrauding creditors'; and

b preferential transactions.

Transactions 'at an undervalue' are transactions in which the consideration received or to be received by the debtor is 'inadequate'.[5] Transactions 'at an undervalue' may be challenged if entered into or performed within the year preceding, or at any time after, the opening of insolvency proceedings.

5 If, for example, the market value of the transferred assets is significantly higher than the consideration received or to be received, taking into account the circumstances of the transaction, including where the price or other terms of such transaction are materially less favourable than those of comparable transactions concluded in comparable circumstances

Transactions aimed at defrauding creditors are treated as such if the following conditions are simultaneously met:

a the purpose of the transaction was to prejudice the rights of creditors (such purpose is presumed, inter alia, if at the time of entry into the transaction the debtor was unable to pay its debts or the liabilities of a debtor exceeded the value of its assets and (1) no consideration was paid to the debtor; or (2) the transaction was with an 'interested party'[6]);

b such transaction resulted in infliction of 'harm to creditors' rights' (such transaction or action resulted in (1) a decrease of the value or the size of the debtor's assets; (2) an increase of the value of claims against the debtor or (3) other consequences that entail or could entail the inability of creditors to satisfy their claims (whether in full or part) from the debtor's assets); and

c the counterparty knew or should have known of the above purpose of the transaction at the time of entry into such transaction (an 'interested party' is presumed to know of such purpose).

Transactions aimed at defrauding creditors may be challenged if entered into or performed within the three years preceding, or at any time after, the opening of insolvency proceedings.

Preferential transactions are transactions that result or may result in preferential satisfaction of a claim of a particular creditor over other creditors, including but not limited to one of the following transactions:

a granting of security or guarantees for pre-existing indebtedness;

b transactions that may alter the ranking of creditors' claims which arose before the entry into of such transaction;

c transactions that will or may result in the satisfaction of unmatured claims of creditors where the debtor has failed to satisfy its matured claims; or

d transactions that provide or may provide more priority in satisfaction of a creditor's claims which arose before the entry into of such transaction when compared to the priority to be given to such claims if their settlement was exercised according to the statutory ranking of creditors in insolvency.

Preferential transactions may be challenged if entered into or performed within the month preceding, or at any time after, the opening of insolvency proceedings. However, preferential transactions falling within both (a) and (b) above, or falling within any of the above where the counterparty knew of the debtor's inability to pay or that the debtor's liabilities exceeded the value of its assets, are subject to a six-month suspect period. A counterparty that is an 'interested party' is presumed (unless proved otherwise) to have such knowledge.

A claim for the invalidation of a transaction in insolvency can be brought to the insolvency court by the liquidator or external administrator of a debtor either at his own

6 Interested parties include, among others, the CEO of the debtor and its directors as well as affiliates and companies comprising the 'group of entities' to which the debtor is attributable.

discretion or when instructed by a creditors' meeting or committee (thus limiting the ability of individual creditors to challenge transactions).

Everything received under a successfully challenged transaction will be subject to clawback (and all assets disposed of by the debtor under such transactions are to be returned to the bankrupt estate).

III RECENT LEGAL DEVELOPMENTS

The most notable recent legal changes are the amendments to the Russian Civil Code, which came into force on 1 July 2014.

In terms of those that are relevant to insolvency, the Russian Civil Code now provides for pledges of bank accounts. Up until 1 July 2014, no effective security over Russian accounts was available and in insolvency all accounts of a debtor had to be closed, except for one account that was used to consolidate all money paid to the debtor. The amendments to the Insolvency Law that were introduced, together with the amendments to the Russian Civil Code, provide that the pledged accounts need not be closed and the pledgee will be entitled to the money standing on the account.

It has also introduced the concept of 'security manager', designed to facilitate security sharing among multiple creditors (for example, under syndicated loans) and which allows a single person to hold Russian law-governed security in favour of multiple creditors. This mechanism has not yet been tested in the Russian courts but it is believed that, in the event of the insolvency of the security manager, the security held by it would be segregated from the insolvency estate of the security manager.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

As noted above, depressed commodity prices and heavy debt burdens have prompted some of the major players in the metals and mining sectors return to their creditors with requests to restructure their debts or extend maturities.

Rusal[7] set a precedent for Russian restructurings in 2014 when it applied to the English and Jersey courts for assistance with its restructuring. Contending with depressed aluminium prices (which have slid nearly 50 per cent since 2008) and a debt load of approximately US$10 billion, Rusal reportedly sought to restructure its debt profile though a consensual process involving its major Russian and international creditors. Requiring unanimous creditor consent in order to complete the restructuring with the international creditors, and faced with a small minority of hold-out creditors, Rusal is seeking to force through the restructuring pursuant to a court-led scheme of arrangement, a court-led process that is often used for overcoming the impossibility or impracticality of obtaining the individual consent of every creditor to be bound to a proposed course of action and preventing a minority of creditors from frustrating what

7 Formerly the largest aluminium company by production; www.bloomberg.com/news/2012-02-27/top-10-aluminum-companies-in-2011-by-production-table-.html.

is otherwise in the interests of a company's creditors in general. English law-governed schemes of arrangement have long been regarded as an important restructuring tool in western Europe, but this is the first occasion on which this tool has been utilised in the context of a Russian restructuring. At the time of writing, the scheme is still before the English and Jersey courts.

Mechel, the Russian coal and steel giant, is another major player that continues to contend with a heavy debt burden. With its total debt standing at approximately US$8 billion, Mechel has reportedly already undergone several restructurings with its creditors and is in the process of pursuing another restructuring. According to media reports, a number of possible options have been suggested, which include a possible state bail-out (via bridge financing or a convertible bond) – although the latest reports suggest that this option may not receive government backing – as well as a sale of assets to a newly formed consortium involving fellow steel makers Evraz and Amurmetal. It has also been reported that the restructuring may result in a dilution of the controlling shareholder's stake in the company, something that has not been seen in major Russian restructurings in recent years.

V INTERNATIONAL

Russian insolvency proceedings can generally be commenced only in relation to Russian-registered companies. It is also possible that a Russian court would recognise decisions on insolvency proceedings in relation to a foreign entity issued by a foreign court (e.g., a decision of a foreign court restricting the disposal of property located in Russia and owned by a foreign entity against which insolvency proceedings had been commenced outside Russia). Recognition by the Russian court of a decision of a foreign court could in theory be either on the basis of an international treaty (although at present there are no treaties relating to insolvency to which Russia is a party) or on the basis of the principle of reciprocity (although there is no established court practice on this point).

VI FUTURE DEVELOPMENTS

As noted above, a significant recent development has been the use by Rusal of English and Jersey law schemes of arrangements to force through its restructurings plans. It will be interesting to see whether this sets a precedent for other Russian companies. It will also be interesting to see what impact the increased use of derivatives (which has followed legislative and infrastructural reform in this area), and the increased tendency of major Russian banks to join international lending syndicates, will have on the restructuring processes in the Russian market.

Appendix 1

ABOUT THE AUTHORS

VLADIMIR BARBOLIN
Clifford Chance
Vladimir Barbolin joined the Moscow office of Clifford Chance in 2001 and has been a counsel of the finance practice since 2008. He has also spent some time in the real estate finance team in the London office of the firm. He specialises in cross border-finance, and his expertise includes pre-export finance, syndicated lending, insolvency and restructuring, secured and unsecured facilities, real estate finance and structured finance.

ADAM FADIAN
Clifford Chance
Adam Fadian is a counsel in the Moscow office of Clifford Chance. He specialises in debt restructuring, insolvency and workouts, structured trade and commodity finance, syndicated lending and acquisition finance. He has been active in the Russian market for more than seven years and his industry expertise includes metals and mining and oil and gas.

CLIFFORD CHANCE
ul Gasheka 6
125047 Moscow
Russia
Tel: +7 495 258 50 50
Fax: +7 495 258 50 51
vladimir.barbolin@cliffordchance.com
adam.fadian@cliffordchance.com
www.cliffordchance.com