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The Curious Case of Vladimir Kekhman, and Treatment of Foreign Insolvencies in Russia

A well-known Russian businessman Vladimir Kekhman successfully sought a bankruptcy order in the UK back in 2012, but despite that fell under the Russian insolvency procedure in 2015. Russian courts, including the Supreme Court of the Russian Federation, reasoned that foreign insolvency did not prevent Russian courts from hearing the case under the Russian insolvency law.

Russian citizens do not initiate insolvency proceedings outside Russia regularly, and the case of Mr. Kekhman in this respect is exemplary in viewing a larger picture related to the treatment of foreign insolvencies in Russia.

Background

Mr. Kehkman has a somewhat extraordinary personality. He is a Russian citizen, domiciled and resident in the Russian Federation. In 1994, he went into the fruit business, which rapidly expanded in the 1990s and the beginning of 2000s, turning into a multibillion-dollar empire. It is said that every third banana was imported to Russia by the JFC Group founded by the businessman, sometimes referred to as “Banana King”. In addition to his business endeavors, Mr. Kekhman led an active social life and acted as a director at the Mikhailovsky Theatre in Saint Petersburg and the Novosibirsk State Academic Opera and Ballet Theatre.

In 2011, Mr. Kekhman’s business got into financial troubles. Negotiations and restructuring attempts failed, and several lending banks took steps to enforce their securities and called in their guarantees. On 20 February 2012, insolvency proceedings against JFC were initiated in Russia.

Escape to the UK to file for insolvency

At that time (2012), Russian law did not provide for personal insolvency, so Mr. Kekhman went to England for 2 days to file a petition seeking a bankruptcy order. In support of the English jurisdiction, he argued that he was personally present in the UK on the day he filed the petition and that 3 personal guarantees and indemnities given by him were subject to English law.

Despite a rather weak connection, on 5 October 2012, the court issued a bankruptcy order on Mr. Kekhman's petition. Under English law, personal presence in the country has been sufficient to found jurisdiction in bankruptcy for at least a century (Section 1(2) of the Bankruptcy Act 1914, Section 265 Insolvency Act 1986). Once jurisdiction is established, the court has an unfettered power to make a bankruptcy order or reject the petition. In the present case, the court exercised its discretion in favor of Mr. Kekhman. It took into account the fact that there was no regime of personal insolvency in Russia, so that Mr. Kekhman had come to the English jurisdiction to fill a lacuna in the laws of Russia.

All attempts by Russian creditors to challenge the English bankruptcy order failed. On 5 October 2013, Mr. Kekhman was discharged from his bankruptcy under Section 279(1) of the Insolvency Act 1986.

Unhappy creditors start a fight in Russian courts

In 2015, Russian insolvency law was amended to include special provisions on personal insolvency (insolvency of individuals). Following such developments, Sberbank, the largest bank in Russia, filed a motion to hold Mr. Kekhman insolvent under Russian law. This would give creditors significant control over the businessman's assets in Russia (and possibly abroad). As a result, Russian courts were faced with the intricate question – what are the consequences of a foreign insolvency order issued against a Russian individual within the framework of Russian insolvency law?

Interestingly, English courts analyzed this same question when issuing the order. Relying on the expert opinion of two prominent Russian scholars, they arrived at the conclusion that the bankruptcy order was unlikely to be recognized or enforced by the courts of the Russian Federation. And right they were – Mr. Kekhman's attempts to discontinue or discharge from Russian insolvency proceedings fell flat. The refusal to give effect to the English judgment was based on the following arguments (in no particular order):

- The bankruptcy order dated 5 October 2012 was not preliminarily enforced in Russia, in other words no exequatur was received;
- Close connection to Russia (transactions with major creditors were made in Russia and entailed execution in Russia, the debtor resided in Russia) and no connection with the UK;
- The insolvency procedure affects the status of an individual and thus shall be carried out pursuant to the personal law of the individual, *i.e.* Russian law;
- Russia is not a party to any international agreements on insolvency matters and Mr. Kekhman failed to prove application of the principle of reciprocity between England and Russia, when it comes to recognition of personal insolvency judgments;
- By the time Sberbank filed the insolvency claim with a Russian court, Mr. Kekhman had already been discharged from his bankruptcy in England;
- The aim of insolvency is not confined to the release of a debtor from his obligations, but comes down to fair satisfaction of creditors' claims.

While objecting to the Russian insolvency proceedings, Mr. Kekhman in a separate motion asked the courts to recognize and enforce the English bankruptcy order. Not surprisingly, the motion was denied.

Firstly, it was held that the applicant failed to prove the existence of reciprocity in recognizing personal insolvency judgments between Russia and the UK, which is a prerequisite for the enforcement of foreign insolvency judgments in Russia. Secondly, due to the public element present in bankruptcy disputes, the court asserted exclusive jurisdiction of Russian courts to handle personal insolvency cases of Russian citizens. Such "arbitrary extension of the jurisdiction of foreign courts to matters of public importance in Russia" as displayed by English courts was held contrary to the Russia's public policy. The court also found a violation in the "confiscatory" character of the bankruptcy order to the creditors, breaching such principles as the equality of parties and inviolability of property.

General remarks on treatment of foreign insolvencies in Russia

From the treatment of Mr. Kekhman's case, one may conclude that Russian courts are overly hostile to foreign insolvencies, when there is some sort of connection to the Russian territory. However, this impression could be deceptive, as Mr. Kekhman's flight to England for the sole purpose of filing for his bankruptcy was seen by many as an example of bankruptcy tourism, the negative image of which must have affected the courts. But taking away that negative connotation, the situation with the status of foreign insolvencies in Russia looks less harsh, but still quite ambiguous.

Under Article 1(6) of the Russian insolvency law, judgments of foreign courts in insolvency cases are recognized in Russia in accordance with international treaties of the Russian Federation. In case of absence of the latter, such judgments are recognized on the basis of reciprocity. Since there are no relevant international treaties, recognition is only possible through the reciprocity mechanism. This means that either there should be proven cases of recognition by foreign courts of Russian insolvency judgments, or the hypothetical probability of such recognition following from laws of the foreign country.

Whereas in the Kehkman's case the court did not find such reciprocity, in another dispute concerning insolvency of a company registered in Denmark (case No. A56-14945/2004), the court relied on the Danish legislation to discover the possibility of such recognition. This was enough for Russian courts to discontinue proceedings against the Danish debtor. Notably, there are two important details of this case worth mentioning. First, the foreign insolvency judgment was preliminarily recognized in Russia. Second, the Russian creditor (claimant) was included in the register of creditors in Denmark, so there was no reason to believe that his rights would be violated, should the proceedings in Russia cease.

In yet another case (No. A09-14352/2014) involving a Kazakh debtor undergoing insolvency procedure in Kazakhstan, the Russian court discontinued parallel proceedings in Russia with reference to the international practice and applied *lex fori concursus* to the matter at hand. According to the Kazakh insolvency law, in case of a debtor's insolvency, all pecuniary disputes involving the debtor shall be terminated. This was enough for the Russian court to dismiss the claim of a creditor brought in Russia. Remarkably, as opposed to the above case, the court did not bother going into the issues of reciprocity or recognition. It also overlooked the problem related to the rights of the Russian creditor, if the latter is left out from the Kazakh register of creditors.

Unlike the EU member states, which cooperate under the common framework for insolvency proceedings, Russia is not a party to any specific insolvency-related regime. This situation is exacerbated by the fact that Russian insolvency law is quite immature when it comes to insolvencies complicated by the foreign element. The categories of main and

secondary proceedings, key to resolving trans-border insolvencies in the EU, are not known in Russia. Amid the surge in bankruptcies of multinational companies, matters raising important cross-jurisdictional legal issues are likely to appear in Russian courts more often, bringing more certainty and predictability.

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