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**Inside Story – May 2018**

**When Bitcoin meets Insolvency:**

**Is Bitcoin Property? Dutch and Russian Responses**

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*Introduction*

The capital structures of companies in the 21st century will be starkly different from those of the last century. Once driven by hard assets, such as real estate, natural resources and machinery, modern businesses have become highly dependent and valued mostly on the basis of intangible assets – contracts, intellectual property and goodwill. Recent years have seen a rapid development of new technologies allowing for the creation of novel types of intangible assets with their own value and characteristics. There is hardly anyone these days who has not heard about Bitcoin or cryptocurrencies in general. As the world’s first decentralised digital currency, Bitcoin has become possible thanks to the blockchain technology – based on publicly distributed, shared and immutable digital ledgers. Anonymity and irreversibility of transactions on blockchain have made it attractive for users.

A lot does, however, depend on public perception (*i.e.* trust) and government reaction. The latter so far has been rather mixed. Among rising fears of the technology being used for illicit activities (money laundering, extortion, financing of terrorism, etc.) and weak investor protection, state authorities struggle to find a balanced solution. But while regulatory and legislative bodies take their time to establish legal frameworks for the operation of the crypto market, courts have no such time and are faced with the need to expeditiously resolve real disputes. This is particularly so in the context of insolvency cases, in which several questions may arise. For instance, how to treat various types of digital assets belonging to the debtor, how to trace them in cases where the debtor refuses to disclose their existence, transfers them to third parties or simply refuses to provide access to the insolvency practitioner or court? And lastly, how to dispose of them and at what exchange rate, if any?

This Inside Story follows two recent cases, one from Russia and the other from the Netherlands, where the courts considered whether Bitcoin constituted ‘property’ and could provide a valid legal ground to initiate insolvency proceedings.

**The Russian Response: The Case of Mr. Tsarkov**

This case was first decided by the Commercial Court of Moscow (Russia) in March 2018[[1]](#footnote-1) and then by the 9th Appellate Court (Moscow) in May 2018[[2]](#footnote-2), and concerned the personal insolvency (bankruptcy) of Mr. Tsarkov. In this case the insolvency practitioner (IP) filed a motion with the court asking for a mandate to include the contents of a crypto wallet at: <[www.blockchain.info](http://www.blockchain.info)>, amounting to around 0.2 BTC (valued at approximately USD 2,300 as of the date of the judgment: 5 March 2018) and allegedly owned by Mr. Tsarkov, within the estate subject to the insolvency. In addition, the IP requested the key to the wallet to be handed over to him. The IP argued that Bitcoin was an asset, and since the primary purpose of the bankruptcy procedure was the sale of the debtors’ assets and value maximization to creditors, Bitcoin should fall within the insolvency estate. Mr. Tsarkov objected, claiming that current Russian law did not address transactions involving cryptocurrency and that cryptocurrencies could not be an object of property (civil) rights.

Resolving the dispute and refusing to recognise Bitcoin as an asset for the purposes of insolvency law, the court of first instance essentially provided two arguments. Firstly, it noted that the legal nature of cryptocurrency is unclear and cannot be derived by analogy with other forms of property. Additionally (and for no particular reason), the court made references to various policy documents by the Central Bank of Russia, in which the latter stressed that digital coins are price volatile and can be used in high-risk or shady transactions breaching anti-money laundering (AML) legislation. Secondly, and more challenging for practical reasons, the court pointed out that due to the anonymity inherent in the operation of (some) crypto wallets (e.g. registration at <[www.blockchain.info](http://www.blockchain.info)> is free and only requires verification by email), the ownership over cryptocurrency in the wallet was difficult to ascertain.

These arguments seem rather unpersuasive and were criticized by the 9th Appellate Court. Firstly, the appellate court noted that the objects of property rights are not exhaustively listed in Russian law and include ‘other assets’ (Article 128 of the Russian Civil Code). It also stressed that:

“taking into account current economic realities and the *level of development of information technologies*, the broadest interpretation [of ‘other assets’] was justified.”

Moreover, in January 2018, the Russian Ministry of Finance proposed draft legislation defining ‘cryptocurrency’ as a digital financial asset existing in the distributed ledger of digital transactions.[[3]](#footnote-3) The appellate court took this into account. It made a general remark that any property of the debtor having economic value, including cryptocurrency, shall not be arbitrarily excluded from the insolvency estate. The opposite approach would deprive creditors of their right to the fullest satisfaction of their claims. The ‘excluded’ assets shall be prescribed by the Federal Law “On Insolvency (Bankruptcy)” or other federal laws. Secondly, in the case at hand Mr. Tsarkov did not dispute the fact that BTC belonged to him – there was no disagreement about it. He could freely use or dispose of it, which, according to the appellate court, was similar to the right of ownership. In the end, the appellate court reversed the judgment of the Commercial Court of Moscow and obliged Mr. Tsarkov to hand over the key to the crypto wallet to the IP.

**The Dutch Response: The Case of Koinz Trading BV**

By a judgment of the Midden-Nederland court dated 17 January 2018, Koinz Trading B.V. (debtor) was ordered to pay the mining proceeds of 0.591 BTC to Mr. Vries or risk paying a fine of up to EUR 10,000. Following the failure of the debtor to comply with the court order, Mr. Vries filed a petition for the debtor’s insolvency with the court in Amsterdam. Under Article 1 of the Dutch Bankruptcy Act, a debtor who is in a situation where he has ceased to pay his debts as they fall due shall be declared bankrupt by a court order either on his own application or on the petition of one or more of his creditors. The question therefore was whether the obligation to transfer Bitcoins was due and demandable or, in other words, verifiable for the purposes of opening insolvency proceedings?

In its judgment dated 20 March 2018,[[4]](#footnote-4) the court answered this question in the affirmative. It reasoned that Bitcoin existed from a:

“unique, digitally encrypted series of numbers and letters stored on the hard drive of the right-holder’s computer. Bitcoin is ‘delivered’ by sending bitcoins from one wallet to another wallet. Bitcoins are stand-alone value files, which are delivered directly to the payee by the payer in the event of a payment.”

Therefore, the court concluded:

“*Bitcoin represents a value and is transferable. […] it thus shows characteristics of a property right*. A claim for payment in Bitcoin is therefore to be regarded as a claim that qualifies for verification.”

In line with the reasoning of the Russian appellate court, which accepted BTC as property, the court in Amsterdam considered the obligation to transfer Bitcoins to be legally valid and capable of being used for the determination of the debtor’s insolvency. This conclusion allowed the court to initiate insolvency proceedings against Koinz Trading BV.

Importantly, the Dutch court did not need to (and indeed, it did not) characterize or fully define the legal nature of Bitcoin. It should be noted, that under the Dutch Bankruptcy Act, it was only necessary for the court of first instance to assess whether it appeared summarily that the applicant had a right of action and that a situation existed in which the debtor ceased to pay his debts as they fall due. The term ‘payment’ refers not only to the satisfaction of a monetary claim, but more generally to the satisfaction of a commitment.[[5]](#footnote-5)

**Summary**

While regulation of crypto assets is still in its embryonic stage, insolvency courts serve as a testing (‘battle’) ground, both in terms of defining the legal status of cryptocurrencies and finding practical ways of recovering and handling their value for the general benefit of creditors.

The examples of the recent cases from Russia and the Netherlands show the difficulties of coping with new technological developments in their application to traditional legal rules (e.g. the Dutch Bankruptcy Act dates back to 1896). While at first the Russian court refused to recognize the legal status of Bitcoin and include it into the insolvency estate, this obvious mistake was soon remedied by the appellate court, which, together with the Dutch court, acknowledged a property right over Bitcoin. Nonetheless, the complexity of legal challenges related to the advancements of blockchain technology, and the appearance of new types of tokens, coins and other crypto assets, will require more flexibility from courts, as well as the willingness to embrace new knowledge and closely cooperate across national borders.

1. Judgment of the Commercial Court of Moscow from 5 March 2018, in case No. А40-124668/17-71-160 Ф, available at: <https://drive.google.com/file/d/1cE5PngE-CCcphk7kqfcm6nizfe5MjbH6/view>. [↑](#footnote-ref-1)
2. Judgment of the 9th Appellate Court from 15 May 2018, in case No. А40-124668/2017, available at: <http://kad.arbitr.ru/PdfDocument/58af451a-bfa3-4723-ab0d-d149aafecd88/A40-124668-2017\_20180515\_Postanovlenie\_apelljacionnoj\_instancii.pdf>. [↑](#footnote-ref-2)
3. Draft federal act “On digital financial assets”, first published on 25 January 2018, available at:

<https://www.minfin.ru/ru/document/?id\_4=121810&order\_4=P\_aDATE&dir\_4=DESC&is\_new\_4=1&page\_4=1&area\_id=4&page\_id=2104&popup=Y>. [↑](#footnote-ref-3)
4. Judgement of the Amsterdam court from 20 March 2018, case ECLI:NL:RBAMS:2018:869, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:869>. [↑](#footnote-ref-4)
5. Judgement of the Dutch Supreme Court from 3 June 1921, NJ 1921. [↑](#footnote-ref-5)