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## Treating the New European Disease of Consumer Debt in a Post-Communist State: The Groundbreaking New Russian Personal Insolvency Law

Jason J. Kilborn

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# TREATING THE NEW EUROPEAN DISEASE OF CONSUMER DEBT IN A POST-COMMUNIST STATE: THE GROUNDBREAKING NEW RUSSIAN PERSONAL INSOLVENCY LAW

*Jason J. Kilborn\**

*Dolg platezhom krasen*—A debt is beautiful [only] when paid<sup>1</sup>

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1. Russian proverb. The figurative meaning of this proverb is closer to “one good turn deserves another” or “tit for tat.” See VLAS P. ŽUKOV, SLOVAR’ RUSSKIX POSLOVITS I POGOVOROK 106 (4th ed. 1991).

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## INTRODUCTION

I will never forget the day in the summer of 1992 when I stepped onto Red Square in Moscow for the first time. Just months after the dissolution of the Soviet Union, decades of economic restrictions and consumer goods shortages were clearly evident in the clothing and cars of the Muscovites

around me. Oddly, directly across the square from the red stars atop the Kremlin—the very symbols of Communism—stood an enormous department store, *Gosudarstvennyi Universal'nyi Magazin* (“State Universal Store” or “GUM”). The shops of GUM also reflected decades of neglect of consumer culture, but within a few short years, this would change on a vast scale. A debt-fueled consumer explosion would bring to Russia both the benefits and burdens of earlier market transformations in Europe: masses of goods that the average citizen could never have imagined owning, but also masses of debt taken on to enjoy those goods now and capitalize on hope for sustained if not improved economic good fortune in the future.

This article examines the tumultuous transition from restrictive Communism to the debt-fueled consumer economy of modern Russia. In particular, it surveys Russia’s legal response to severe debt distress, situating it in the context of nearly one thousand years of historical development. Russia’s reactions to personal debt and bankruptcy<sup>2</sup> have always linked the country firmly with European trends and traditions. In its latest move, effective October 1, 2015, Russia has finally joined most of its European neighbors in adopting a personal bankruptcy law, with characteristics that reflect both evolving international best practices and a series of lessons not learned. This article offers the first detailed exposition in English of the two steps forward represented by this new law, as well as an evaluation of the one step back that will likely result when Russia experiences the same challenges with personal insolvency procedures that its neighbors have faced in recent years.

The analysis presented here contributes to a deeper understanding of modern Russian law and society by tracing the striking emergence of a massive consumer debt problem only a few years after the fall of Communism, along with the development of a legal solution that is largely consistent with European norms but remains in many respects uniquely Russian. It tells the story of how a people with lots of money but nothing to

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2. Throughout this article, the terms “bankruptcy” and “insolvency” will be used more or less interchangeably to indicate the state of a debtor who is unable to pay all of his or her debts when due. The two terms have technical distinctions in certain contexts (and in certain countries more than in others), but particularly in the Russian context, they are virtually synonymous. Indeed, the name of the Russian law governing this topic is the Federal Law “On Insolvency (Bankruptcy).” See *infra* note 142.

buy soon transformed into a nation deluged by things to buy, but also by an exponential growth of consumer debt to finance those purchases.

Part I charts the rise of consumerism and consumer debt in Russia, which began in earnest a mere fifteen years ago. Part II lays out the current international perspective on best practices in legal procedures for treating overwhelming consumer indebtedness. This topic has attracted significant attention in recent decades from international organizations, most recently in a voluminous and compelling report by the World Bank. Part III examines the Russian response to this problem. It begins with a one thousand-year retrospective on the often intriguing variety of ways in which pre-Revolutionary Russian law responded to insolvency, continuing with a brief description of the reemergence of commercial bankruptcy law in post-Soviet Russia. Finally, this Part presents a detailed analysis of the new procedure for personal insolvency, concluding with an evaluation of several challenges this new system is likely to face in light of experiences with analogous laws elsewhere in Europe and the situation on the ground in Russia today. The new Russian law is likely to be very influential as neighboring countries consider developing their own personal insolvency legislation. If neighboring legislatures can incorporate not only the elegant and efficient procedure of the new Russian law, but also the lessons Russian lawmakers did not learn from surveying European experience, these countries will take a substantial leap forward.

#### I. SOMETHING FROM NOTHING: THE EMERGENCE OF CONSUMER DEBT AND OVERINDEBTEDNESS IN POST-COMMUNIST RUSSIA

The fall of the Soviet Union in December 1991 was both a product and a cause of turbulent economic transformation.<sup>3</sup> The new Russia entered another *smutnoe vremia*<sup>4</sup> that would challenge the survival skills of banks and consumers alike. In

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3. See Iris van de Wiel, *The Russian Crisis 1998 Economic Report*, RABOBANK (Sept. 16, 2013), <https://economics.rabobank.com/publications/2013/september/the-russian-crisis-1998/>.

4. For a discussion of this historical reference, see J.P. Sommerville, *351-10:Russia and Poland, 1598-1613: The Time of Troubles (Smutnoe Vremia)*, <https://faculty.history.wisc.edu/sommerville/351/351-10.htm> (last visited Mar. 18, 2016).

the following two years, ordinary consumers endured hyperinflation that destroyed savings, made acquiring basic life needs a Herculean task, and undermined trust in the banking system.<sup>5</sup> Consumer borrowing and lending could not germinate, much less thrive in this environment.<sup>6</sup> And just as things appeared to be stabilizing by the late 1990s, a combination of poor government budget management, falling oil and other natural resource prices, and a crisis of investor confidence in Asian emerging markets led to a Russian sovereign debt default in August 1998, a general banking system collapse, and a plunge in the value of the ruble, ushering in another era of rampant inflation and consequent social unease.<sup>7</sup> At the turn of the twenty-first century, with a rebound in oil prices and demand for domestic products (an ironic positive impact of a massively devalued ruble), the Russian economy, real wages, and consumer confidence finally turned the corner and began a nearly decade-long period of robust growth.<sup>8</sup>

For the first time, Russia had at last developed an environment conducive to the development of a consumer credit market. In Soviet times, rationing and shortages made consumer credit superfluous.<sup>9</sup> The problem from at least the 1960s until into the 1990s was that goods were scarce, not that funds to buy them were scarce.<sup>10</sup> Consumers had money to buy things<sup>11</sup>;

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5. See van de Wiel, *supra* note 3; Steve Campbell, Comment, *Brother, Can You Spare a Ruble? The Development of Bankruptcy Legislation in the New Russia*, 10 BANKR. DEV. J. 343, 383–86 (1994); ALYA GUSEVA, INTO THE RED: THE BIRTH OF THE CREDIT CARD MARKET IN POSTCOMMUNIST RUSSIA 104 (2008).

6. See GUSEVA, *supra* note 5, at 45.

7. See van de Wiel, *supra* note 3; Gérard Bélanger et al., *Russian Federation: Recent Economic Developments* 7, 10, 13, 18, 22–23 (IMF Staff Country Report No. 99/100 1999), <https://www.imf.org/external/pubs/ft/scr/1999/cr99100.pdf>; Asya S. Alexandrovich, *Bankruptcy Law, An Economic Medicine: How Russia's New Bankruptcy Legislation Facilitated Recovery From the Nationwide Financial Crisis of August 17, 1998*, 34 CORNELL INT'L L. J. 95, 105–06 (2001).

8. See van de Wiel, *supra* note 3; Gérard Bélanger & Leslie Lipschitz, *Russian Federation: 2001 Article IV Consultation and Post-Program Monitoring Discussions—Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion* 3–10 (IMF Country Report No. 02/74 2002), <https://www.imf.org/external/pubs/ft/scr/2002/cr0274.pdf>.

9. GUSEVA, *supra* note 5, at 47.

10. *Id.*

that is, until the hyperinflation and bank crises of the early and later 1990s wiped out most people's savings and devalued their incomes.

The supply side of this potential market was also quite undeveloped. The legions of new, private banks that sprung up in Russia in the early 1990s had little experience in their newly reborn industry, and many failed in the rollercoaster early transition years.<sup>12</sup> As Russia emerged from the economic detritus of several bank crises, culminating in the August 1998 sovereign default, private banks stepped up their efforts to find new sources of profit not reliant on investments in government bonds and other sources of state capital.<sup>13</sup> Thus began the gradual process of building a consumer credit system from scratch.

Banks began constructing a mass market for consumer credit by acculturating consumers to using cards, either as a precursor to or substitute for cash, in their financial dealings.<sup>14</sup> Early efforts at developing a market for plastic cards (at first, debit cards with overdraft facilities) had been concentrated on only a few thousand "elite" users, and limited "borrowing" on these cards was usually secured by a sizable deposit of the user's funds held at the issuing bank.<sup>15</sup> Banks remained hesitant to expand into direct, mass marketing of cards due to a lack of access to information on potential card users' real incomes and accurate (nonfraudulent) identity and contact information.<sup>16</sup>

Banks overcame these problems by initiating "salary projects" with hundreds of end users at a time by establishing relationships with these end users' large employer-companies.<sup>17</sup> A bank would offer to free the employer-company from the traditional, cumbersome process of disseminating large amounts of cash to long lines of (impatient) employees on pay day.<sup>18</sup> In-

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11. Some consumers did borrow to take advantage of unique opportunities to acquire large-ticket items, but this borrowing occurred primarily, if not exclusively, on an informal basis within circles of friends. *Id.* at 48.

12. *Id.* at 50–52, 55.

13. *Id.* at 53–55, 82, 85, 111–12.

14. *Id.* at 62, 85, 97.

15. *Id.* at 57–58, 60–61, 67–68.

16. *Id.* at 63, 69, 72, 95.

17. *Id.* at 83–84, 93–94 (noting that such card projects remain quite common for salary, pension, and other subsidy distribution).

18. *Id.* at 84, 90–91.

stead, the bank would credit salary payments to accounts opened at that bank for each employee (most likely without the employees' consent or desire<sup>19</sup>), and employees would access these credits via plastic cards issued by the bank to each employee.<sup>20</sup> Gradually, as individuals became more trusting of and comfortable with banks, they began to use these cards to make purchases at merchants who had joined the card network.<sup>21</sup>

As with the earlier "elite" programs, these cards were initially restricted-use debit cards, but after 2001, overdraft borrowing facilities became a more common feature.<sup>22</sup> Nonetheless, despite an astronomic expansion of the volume of issued cards and card transactions from the mid-1990s to the mid-2000s, the overwhelming majority of card usage consisted of cardholders' withdrawing credits at an ATM and using their preferred method—cash—to engage in commerce; the proportion of purchases, and particularly *credit* purchases, using cards remained quite low.<sup>23</sup>

The real driver of consumer credit in Russia began in 2000, leveraging the immediate relationship between consumers, rising consumer confidence, and the things consumers increasingly desired to enhance their brighter futures. As real incomes rebounded following the crises of the late 1990s, decades of pent-up consumer demand exploded onto a rapidly expanding retail market.<sup>24</sup> A mass of new consumer retail outlets rose to meet these demands for retail therapy and status confirmation: In 2001 alone, fourteen new shopping centers opened their doors, and not long thereafter, IKEA opened a second shopping

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19. *Id.* at 97.

20. *Id.* at 84, 90–91.

21. *Id.* at 91–93, 104 (noting that this solved another series of problems related to cash scarcity and intercompany debt). By 2014, the share of payments made with cards rose to 21 percent, up from only 5 percent in 2009. This trend is sure to rise as most retailers will be required as of 2015 to accept card payments and install point-of-sale card terminals. *Financial Cards and Payments in Russia, Executive Summary*, EUROMONITOR INT'L (Nov. 2015), <http://www.euromonitor.com/financial-cards-and-payments-in-russia/report>.

22. GUSEVA, *supra* note 5, at 94, 96, 105 (noting that outstanding balances are usually required to be repaid within a month, secured by directly deposited wages).

23. *Id.* at 86, 100–03, 106–08 (noting that insufficient merchant acceptance inhibited the growth of using cards as payment devices).

24. *Id.* at 112.



mall in the Moscow area, the MEGA-2, the largest and busiest shopping mall in Eastern Europe.<sup>25</sup> As noted by Alya Guseva in her brilliant study of consumer credit in transition-era Russia, “[c]onsumption appears to be one of the most obvious means of social differentiation and status achievement available to a growing number of wage earners in today’s Russia.”<sup>26</sup>

The process of keeping up with the Ivanovs proceeded at a furious pace. In 2009, the World Bank observed with some concern that “[h]ousehold lending was largely unknown in 2000 but had reached RUB 1 trillion by the end of 2005 and RUB 4 trillion by the close of 2008,” accounting for over 20 percent of banks’ total loan portfolios by 2006.<sup>27</sup> This relentless march upward continued, with total outstanding loan volume to individuals exceeding 5 trillion rubles in 2011, surpassing 7 trillion in 2012, and vaulting over 10 trillion rubles by early 2014.<sup>28</sup> While home mortgage debt is included in these figures, such high-value loans represent a relatively small portion of total outstanding personal debt, though the proportion of mortgage debt has risen to nearly 30 percent in the past few years.<sup>29</sup> Bor-

25. *Id.* at 114.

26. *Id.* at 113.

27. World Bank, Private & Fin. Sector Dev. Dep’t, *1 Russian Federation Diagnostic Review of Consumer Protection in Financial Services: Key Findings and Recommendations* 11–12 (2009), [http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/RU\\_CPFL\\_Vol\\_I\\_draft\\_EN.pdf](http://siteresources.worldbank.org/INTECAREGTOPPRVSECDEV/Resources/RU_CPFL_Vol_I_draft_EN.pdf).

28. Cent. Bank of the Russian Fed’n, *Housing (Mortgage) Loan Market in Russia: Statistical Yearbook No. 1 (2005-2013)*, at 56 (2015), [http://www.cbr.ru/eng/statistics/b\\_sector/stat/Stat\\_digest\\_mortgage\\_01\\_e.pdf](http://www.cbr.ru/eng/statistics/b_sector/stat/Stat_digest_mortgage_01_e.pdf); *Information on Household Lending Risks in 2014*, CENT. BANK RUSS. FED’N (Jan. 13, 2015), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/risk\\_14\\_e.htm&pid=pdko\\_sub&sid=itm\\_45841](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/risk_14_e.htm&pid=pdko_sub&sid=itm_45841).

29. See World Bank, *supra* note 27, at 11 (“[M]ost household loans in Russia are for consumption not related to housing.”); Cent. Bank of the Russian Fed’n, *Godovoi Otchyot Banka Rossii za 2014 God* 23 (2015), <http://cbr.ru/publ/?PrtId=god> (reporting 11.3 trillion rubles of credit to individuals, of which 3.5 trillion rubles is mortgage credit); Cent. Bank of the Russian Fed’n, *Analiticheskie Materialy o sostoyanii rynka ipotechnogo zhilishchnogo kreditovaniya v 2014 godu* 2 (2015), [http://www.cbr.ru/statistics/ipoteka/am\\_2014.pdf](http://www.cbr.ru/statistics/ipoteka/am_2014.pdf). For a detailed analysis of the development and operation of the Russian mortgage market, see OLGA MASHKINA ET AL., *THE EMERGING MORTGAGE MARKET IN RUSSIA: AN OVERVIEW WITH LOCAL AND FOREIGN PERSPECTIVES* (2007), <http://epub.lib.aalto.fi/pdf/hseother/b82.pdf>.

rowing activity was (and remains) widespread: in 2004, 25 percent of Russians took at least one consumer loan, rising to nearly 40 percent in the following year.<sup>30</sup>

Banks supercharged this buying frenzy by targeting consumers at the most opportune moment: at the point of sale. Not relying on the slow uptake of credit cards, banks set up booths with one or two representatives in retail outlets to extend “express loans”—approved while you wait!<sup>31</sup> Some banks combined the two loan products, extending express loans in the form of instant-issue credit cards (again, approved at the point of sale after a brief application process) or automatically offering cards to customers who had recently paid off an express loan.<sup>32</sup> The leader of this onslaught of consumer credit grew to one of the most profitable banks in Russia within just three years of its founding, and by 2004, one of the most profitable banks in the world.<sup>33</sup>

With such a meteoric rise in lending, inevitably defaults would follow. In their aggressive pursuit of the new frontier of consumer credit profit, banks had sacrificed careful underwriting and risk management.<sup>34</sup> Banks extended trillions of rubles of express loans on the basis of often unverified information supplied by applicants, “preferring to worry about uncertainty and developing screening techniques later.”<sup>35</sup> Russian banks had come a long way in a very short time period from the days

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30. GUSEVA, *supra* note 5, at 109; *see also* *Fear over Default as Personal Bank Debt in Russia Doubles in Two Years*, RT.COM (July 29, 2013, 1:23 PM), <http://on.rt.com/btgdtd> (citing a study estimating the number of retail borrowers in Russia at 34 million, or 45 percent of the economically active population, with some regions reaching 100 percent).

31. GUSEVA, *supra* note 5, at 115, 121.

32. *Id.* at 115–16.

33. *Id.*

34. *See* Stephan Barisitz, *Credit Boom in Russia Despite Global Woes—Driving Forces and Risks*, in 26 OESTERREICHISCHE NATIONALBANK, FINANCIAL STABILITY REPORT 82, 90–91 (2013), [http://www.oenb.at/dms/oenb/Publikationen/Finanzmarkt/Financial-Stability-Report/2013/Financial-Stability-Report-26/chapters/fsr\\_26\\_report\\_special\\_topics3.pdf](http://www.oenb.at/dms/oenb/Publikationen/Finanzmarkt/Financial-Stability-Report/2013/Financial-Stability-Report-26/chapters/fsr_26_report_special_topics3.pdf) (noting the rapid expansion of unsecured consumer credit in 2012–13 and opining that “one may doubt the capacity of banks to reliably verify the quality of the numerous incoming credit applications,” especially in light of cost-saving automation of the underwriting process).

35. GUSEVA, *supra* note 5, at 121.

of reticent issuance of debit cards only to their most trusted, elite customers.

Very early in the expansion of the consumer credit market, the growth rate of overdue loans outstripped the growth rate of total outstanding credit to individuals. More than a decade later, that disquieting relationship continues. In 2003, total outstanding credit to individuals more than doubled (111 percent growth) to just under 300 billion rubles, with only 3.6 billion—1.2 percent—overdue.<sup>36</sup> The following year, total outstanding credit to individuals doubled again (107 percent growth), but the volume of defaulted loans grew even faster, 139 percent, to 8.6 billion rubles.<sup>37</sup> The scissors continued to open in 2005, with total loan volume growing 91 percent to exceed 1 trillion rubles, but defaults growing 158 percent to just over 22 billion (almost 2 percent of total outstanding loans).<sup>38</sup> The global financial crisis led to a 10 percent step back in consumer lending in 2009,<sup>39</sup> though now an even more troubling indicator began to draw attention. During the course of 2009, the proportion of loans to individuals more than ninety days overdue rose from 4.4 percent to 9.0 percent, nearing 300 billion rubles.<sup>40</sup>

Renewed vigorous growth in lending volume pulled the *percentage* of long-overdue individual loans back to 4.6 percent by the beginning of 2013, but the *volume* of such defaulted loans continued its relentless march upward, growing more than 64

36. *Selected Indicators of Credit Institutions Performance by Assets as of 31.12.03*, CENT. BANK RUSS. FED'N (Mar. 9, 2004), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/4-1-3\\_010104\\_e.htm&pid=pdko\\_sub&sid=opdkovo](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/4-1-3_010104_e.htm&pid=pdko_sub&sid=opdkovo).

37. *Selected Indicators of Credit Institutions Performance by Assets as of 31.12.04*, CENT. BANK RUSS. FED'N (Mar. 24, 2005), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/4-1-3\\_010105\\_e.htm&pid=pdko\\_sub&sid=opdkovo](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/4-1-3_010105_e.htm&pid=pdko_sub&sid=opdkovo).

38. *Selected Indicators of Credit Institutions Performance by Assets as of 31.12.05*, CENT. BANK RUSS. FED'N (Mar. 16, 2006), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/4-1-3\\_010106\\_e.htm&pid=pdko\\_sub&sid=opdkovo](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/4-1-3_010106_e.htm&pid=pdko_sub&sid=opdkovo).

39. L.B. Lazarov et al., *Problems of Development of Consumer Credit Market*, 10 FUNDAMENTAL RES. 2174, 2176 (2014), <http://www.rae.ru/fs/pdf/2014/12-10/36547.pdf>.

40. *Information about the Risks of Lending to Individuals in 2009*, CENT. BANK RUSS. FED'N (Apr. 3, 2012), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/4-1-3\\_010106\\_e.htm&pid=pdko\\_sub&sid=opdkovo](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/4-1-3_010106_e.htm&pid=pdko_sub&sid=opdkovo).

percent in 2013 to over 500 billion rubles.<sup>41</sup> The Central Bank had been observing these growing defaults with alarm for years. In 2012, it warned of a growing “latent cumulative credit risk . . . largely for the portfolio of point-of-sale lending,”<sup>42</sup> and in 2013, it imposed tighter loan-loss provision requirements on banks, requiring them to double reserves to insulate their balance sheets from expected consumer default losses.<sup>43</sup> And with good reason: in June 2015, loans to individuals over ninety days in default surged past 1 trillion rubles for the first time, on total outstanding loans hovering around 10 trillion; that is, a startling rate of default topping 10 percent.<sup>44</sup>

While bank commentators have frequently pointed out that the aggregate debt exposure of consumers in Russia is quite modest by comparison to other countries,<sup>45</sup> the debt burden is

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41. *Information on Household Lending Risks in 2013*, CENT. BANK RUSS. FED’N (Jan. 4, 2014), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/risk\\_13\\_e.htm&pid=pdko\\_sub&sid=itm\\_45841](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/risk_13_e.htm&pid=pdko_sub&sid=itm_45841).

42. Vladislav Fedotkin, *Russians Late on Loans, But Credit Bubble Not Bursting Yet*, SPUTNIK INT’L (Jan. 21, 2013, 5:25 PM), <http://sptnkne.ws/aGyt>.

43. See *id.*; Barisitz, *supra* note 34, at 94; Courtney Weaver, *Russia Sees Surge in Consumer Credit*, FIN. TIMES (Feb. 13, 2013, 4:28 PM), <http://on.ft.com/X3BuvQ> [hereinafter Weaver, *Russia Sees Surge*]; Courtney Weaver, *Russia Central Bank Warns on ‘High’ Household Indebtedness*, FIN. TIMES (Nov. 20, 2013, 5:06 PM), <http://on.ft.com/1aGZZ93> [hereinafter Weaver, *Russia Central Bank Warns*].

44. *Information on Household Lending Risks in 2015*, CENT. BANK RUSS. FED’N (Oct. 2, 2015), [http://www.cbr.ru/eng/statistics/print.aspx?file=bank\\_system/risk\\_15\\_e.htm&pid=pdko\\_sub&sid=itm\\_45841](http://www.cbr.ru/eng/statistics/print.aspx?file=bank_system/risk_15_e.htm&pid=pdko_sub&sid=itm_45841). The proportion of consumer credit accounts in serious arrears rose even further, to 14.2 percent, as of April 2015, marking a new all-time low in consumer credit performance. *Russians’ Credit Performance Is Worst in Seven Years, According to Data from FICO and NBKI*, PRNEWswire (May 26, 2015, 2:30 AM), <http://www.prnewswire.com/news-releases/russians-credit-performance-is-worst-in-seven-years-according-to-data-from-fico-and-nbki-300087157.html>.

45. See, e.g., Maria Levitov, *Russian Debt Collectors Put On a New Face*, MOSCOW TIMES (May 24, 2005), <http://www.themoscowtimes.com/business/article/russian-debt-collectors-put-on-a-new-face/223088.html> (quoting Alexander Khandruyev, head of Banking and Finance Investment and first vice president of the Russian Association of Regional Banks, stating that consumer loans in Russia amounted to less than 2 percent of gross domestic product (GDP), as contrasted with 72 percent in the United States and 51 percent in Western Europe); Weaver, *Russia Sees Surge*, *supra* note 43 (quoting Oliver Hughes, president of consumer lender Tinkoff Credit Systems, saying “Russian consumers are underleveraged, they

not evenly distributed and weighs more heavily on some. A growing subset of borrowers engaged the market with particular gusto, taking on three, four, and even more loans.<sup>46</sup> In addition to these vulnerable borrowers, commentators identified segments of the population as more likely to encounter financial distress, such as young families.<sup>47</sup> More than the objective debt volume, the debt *service* burden affects consumer borrower vulnerability more directly; that is, the proportion of income needed to service principal and interest charges. A study of Russian consumer indebtedness factors from 2009–2013 discovered that, in light of high interest rates on consumer loans, the debt service burden impacts households in Russia particularly substantially.<sup>48</sup> Nearly one-third of Russian households dedicated 50 percent of their household income to debt service in 2012 (more than double the percentage of such households in the United States).<sup>49</sup> More than 40 percent of households surveyed reported that their income fell below the subsistence level after making their loan payments.<sup>50</sup> In an economy so dependent on oil revenues, a downturn in world oil prices and a consequent, even relatively modest, rise in consumer goods prices or unemployment could quickly send many Russian families into a financial tailspin. The effects of a downturn in oil

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are good players,” and quoting Herman Gref, chairman of the state savings bank, Sberbank, saying “I am not concerned about any bubble. If you compare the level of household debt in Russia with that of mature markets, the conclusion is that everything is under control.”); Iuliya Krivoshapko, *Komu dolzhny – prostili*, ROSSIISKAYA GAZETA (July 26, 2013, 12:40 AM), <http://www.rg.ru/2013/06/26/bankrotstvo.html> (quoting Oleg Ivanov, Vice President of the Association of Regional Banks, as noting that the personal debt burden in Russia was only 10 percent of GDP, as opposed to 50 percent in Germany when that country’s personal bankruptcy law was adopted).

46. See Weaver, *Russia Central Bank Warns*, *supra* note 43 (“[T]he number of borrowers with four or more consumer loans had nearly doubled in the first nine months of 2013 . . . .”); Barisitz, *supra* note 34, at 91 (“[N]o less than 30% of Russian household borrowers have reportedly taken out three or more loans.”).

47. See Barisitz, *supra* note 34, at 91. (“[T]here is certainly a group of households particularly vulnerable to overindebtedness, namely younger people and families with high material needs and yet little financial experience.”).

48. Maria Denisova, *One-Third of Russians Use Half Their Salary to Pay Off Debt*, OPEN ECON. (Mar. 20, 2014), <http://opec.ru/en/1675908.html>.

49. *Id.*

50. *Id.*

prices combined with Western sanctions resulting from Russia's actions in Ukraine will surely challenge many households' finances in the years to come.<sup>51</sup> Household perceptions of future financial perspectives had turned quite sour even before a significant downturn in oil prices and currency values and a significant, inflation-driven income erosion in 2015.<sup>52</sup>

Ironically, a recent contraction of consumer lending may push many borrowers over the edge. As Bob Lawless has demonstrated empirically, a run-up in consumer credit lays the foundation for a rise in financial distress, and a contraction of available consumer credit leaves overindebted consumers with no "bridge" option other than bankruptcy.<sup>53</sup> Major consumer lenders in Russia have finally begun to observe the ill effects of rising defaults on their own bottom lines. As a result, they have ramped up screening of applicants and reduced the flow of available credit.<sup>54</sup> Where will overindebted consumers turn?

Before October 1, 2015, bankruptcy was not an option for Russian consumers drowning in debt. With the introduction of a new personal bankruptcy law, Russian consumers now have such an outlet. The following Part explores the recommended characteristics of successful regimes.

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51. See *The Russian Economy: The End of the Line*, ECONOMIST (Nov. 22, 2014), <http://www.economist.com/node/21633816>.

52. See CREDIT SUISSE RESEARCH INST., EMERGING CONSUMER SURVEY 2015, at 72 (2015), <https://publications.credit-suisse.com/tasks/render/file/?fileID=B3C291F3-CA79-7495-C6DE6C8F8954435F>; Neil MacFarquhar, *Russian Belts Tighten, Affecting Tastes for the Finer Things*, N.Y. TIMES, Jul. 8, 2015, <http://nyti.ms/1J3GENW> (noting an oil-price crash, economic sanctions over Russia's activities in Ukraine, devaluation of the ruble, a sharp rise in inflation, and shrinking real wages for the first time in years).

53. Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 349–54, 362–71 (2007).

54. See Cent. Bank of the Russian Fed'n, *Obzor Fiansovoi Stabil'nosti* 42–43 (Apr. 1, 2015), <http://cbr.ru/publ/?PrtId=stability> (noting a 4.5 percent contraction in outstanding unsecured consumer credit in the first quarter of 2015, more demanding lending policy by key banks, and an expected peak arrears proportion by year-end 2015 of 17 percent); Oksana Kobzeva & Alexander Winning, *Russia's Consumer Credit Market Grinding to a Halt – Home Credit Bank*, REUTERS (Sept. 24, 2014, 5:22 AM), <http://reut.rs/1ulWYHh>.

## II. MODERN INTERNATIONAL NORMS FOR TREATING THE ILLS OF PERSONAL INSOLVENCY

Russia is not the first European nation to struggle with the problems of widespread overindebtedness among its citizens. From Denmark in 1984<sup>55</sup> to Italy and Ireland in 2012,<sup>56</sup> the great majority of countries in Europe have responded to this problem, as Russia now has, by adopting a legal regime for treating the ills of personal (consumer) overindebtedness.<sup>57</sup> Over the past thirty years, European organizations and authorities have been diligent in monitoring the operations of these new regimes and offering suggestions for approaches that work well and not so well.<sup>58</sup> While there is no universally recognized set of “best practices” for personal insolvency systems,<sup>59</sup> wide agreement on a core set of preferred characteristics can be identified from various reports and recommendations, including most recently the World Bank’s *Report on the Treatment of the Insolvency of Natural Persons*.<sup>60</sup> The three most salient

55. See Jason J. Kilborn, *Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark*, 18 INT’L INSOLVENCY REV. 155, 166 (2009).

56. See Jason J. Kilborn, *Reflections of the World Bank’s Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland*, 27 PACE INT’L L. REV. 316, 341 (2015).

57. See JASON J. KILBORN, EXPERT RECOMMENDATIONS AND THE EVOLUTION OF EUROPEAN BEST PRACTICES FOR THE TREATMENT OF OVERINDEBTEDNESS, 1984–2010, at 18–21 (2011).

58. For a survey of prominent recommendations, see *id.* at 2–17; LONDON ECON., STUDY ON MEANS TO PROTECT CONSUMERS IN FINANCIAL DIFFICULTY: PERSONAL BANKRUPTCY, DATIO IN SOLUTUM OF MORTGAGES, AND RESTRICTIONS ON DEBT COLLECTION ABUSIVE PRACTICES 187–89 (2012), [http://ec.europa.eu/finance/finservices-retail/docs/fsug/papers/debt\\_solutions\\_report\\_en.pdf](http://ec.europa.eu/finance/finservices-retail/docs/fsug/papers/debt_solutions_report_en.pdf). (study commissioned by the European Commission’s Internal Markets Directorate General, contract no. MARKT/2011/023/B2/ST/FC).

59. See, e.g., Yan Liu & Christoph B. Rosenberg, International Monetary Fund, *Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox* 14 (Int’l Monetary Fund, Working Paper No. 13/44, Feb. 2013), <https://www.imf.org/external/pubs/ft/wp/2013/wp1344.pdf> (noting that, despite an urgent need, “there is no established international best practice at all in this area [of household debt restructuring]”).

60. See, e.g., World Bank, Insolvency and Creditor/Debtor Regimes Task Force, *Report of the Working Group on the Treatment of the Insolvency of Natural Persons* (2013), [www-](http://www-)

characteristics, and several notable subelements within them, are as follows:

#### *A. Discharge With Few Exceptions*

The *sine qua non* of an effective, modern personal insolvency system is to reduce the debt burden on overindebted individuals to return them to healthy social and economic inclusion. This can seldom be accomplished on a voluntary, negotiated basis with creditors, so the all but universally acknowledged first principle of a personal insolvency regime is a mandated legal discharge of at least some portion of the individual debtor's unsustainable debt.<sup>61</sup> This approach to debt relief is a distinct departure from a long history in virtually every country of favoring creditors and preserving their rights at all costs. Modern personal insolvency laws, however, are built around broader and more sensitive goals and objectives that expand the perspective well beyond largely illusory benefits to creditors, emphasizing instead the broad range of benefits for debtors, their families, and especially broader society.<sup>62</sup> Exceptions to this discharge should be narrow, but some are generally accepted, especially maintenance obligations to children, fines and penalties, and debts incurred as a result of fraud.<sup>63</sup>

#### *B. Access: Objectively Controlled Yet Open, Non-stigmatizing, Low-Cost*

A particular challenge here is striking a balance between enticing the sick to seek treatment while keeping out the healthy. On the one hand, the norm in personal insolvency law should

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wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/05/02/000333037\_20130502131241/Rend  
ered/PDF/771700WP0WB0In00Box377289B00PUBLIC0.pdf. While the author was the chairperson of the drafting committee that created this report, the views he expressed in this article are his own and do not necessarily reflect those of the committee, the Working Group, the Task Force, or the World Bank.

61. See KILBORN, *supra* note 57, at 18–21; World Bank, *supra* note 60, ¶¶ 354; LONDON ECON., *supra* note 58, at 190, 194.

62. These benefits are discussed in depth in World Bank, *supra* note 60, § I.8, ¶¶ 56–111 (discussing the benefits in depth).

63. See KILBORN, *supra* note 57, at 21–23; World Bank, *supra* note 60, ¶¶ 367–71 (also noting an exception for culpable conduct resulting in tort liability for personal injury); LONDON ECON., *supra* note 58, at 197.



be making reasonable sacrifices and paying one's debts; discharge relief should be reserved for cases of serious distress. Identifying the dividing line distinguishing "can't pay" debtors from those who can but would rather not pay should be done in a sensitive, maximally objective manner. While debt relief should not be an unrestricted and automatic right, "overindebted" or "insolvent" debtors (defined as objectively as possible, in terms of their inability to satisfy their debts as they come due within a reasonably foreseeable period) should be granted access without a probing examination of the subjectively identified causes of their financial predicament or "good faith."<sup>64</sup>

On the other hand, more problematic than deterring opportunistic, healthy debtors is enticing sufficient numbers of truly distressed debtors to seek treatment.<sup>65</sup> The type of portfolio relief provided by a personal insolvency system must be made available to an optimally wide range of distressed debtors if the macroeconomic benefits of such a system are to be obtained.<sup>66</sup> The medicine of a discharge is designed to deal with a pandemic of overindebtedness, and it can meet this goal effectively only if relief is dispensed on an appropriately expansive basis.

Relief should be available to those who need it through a neutral, non-cost-prohibitive entry portal, and in a nonpunitive procedure to avoid dissuading eligible, honest but unfortunate debtors. The stigmatizing label "bankrupt" is a powerful deterrent to debtors' seeking necessary relief, and elements of a debt-relief system that accentuate this stigma or exacerbate it should be avoided.<sup>67</sup> For example, restrictions on the activities of debtors during or after a relief proceeding have been and should be minimized.<sup>68</sup>

It is axiomatic that in a system designed to treat debtors' shortfalls of funds to cover debt, access to treatment should not be hindered by those very same funding shortages.<sup>69</sup> Cost efficiency can be achieved only if the system is administered effi-

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64. See KILBORN, *supra* note 57, at 40, 43–45; World Bank, *supra* note 60, ¶¶ 193–97; LONDON ECON., *supra* note 58, at 192–94.

65. See World Bank, *supra* note 60, ¶¶ 120–22.

66. See *id.*, ¶¶ 56–111, 115, 119–20, 124.

67. See LONDON ECON., *supra* note 58, at 194.

68. See World Bank, *supra* note 60, ¶ 123.

69. See KILBORN, *supra* note 57, at 33, 35; World Bank, *supra* note 60, ¶¶ 183–85.

ciently, avoiding burdensome administrative technicalities appropriate for high-value business insolvencies, but inappropriate for low-value personal bankruptcies.<sup>70</sup> Abandoning unconstructive and unnecessary procedural formalities has been a key focus in several stages of revisions to other European personal insolvency regimes.<sup>71</sup> In particular, while the participation of creditors and committees is common and sensible in business bankruptcy cases, creditors' participation in administering personal bankruptcy cases should be minimized or excluded—creditors' rights are protected by objective elements of the regime, not by their control over the process.<sup>72</sup>

Likewise, the intervention of courts in what tend to be simple and routinized personal bankruptcy cases introduces unnecessary burden and expense; a simpler administrative model is generally preferred in Europe, so long as access to a court system is available for parties who feel their due process rights have been violated by the administrator.<sup>73</sup> This preference has often been expressed by requiring debtors to seek informal, out-of-court solutions to their debt problems before engaging a formal administrative or court-based process, though the delays and disappointing results of such requirements have led to their abandonment in recent years.<sup>74</sup> In cases where some degree of negotiation with creditors is permitted or required, low-cost, professional counseling assistance for debtors is crucial to the success of such negotiations.<sup>75</sup> Further, some administrator-imposed or court-imposed “cram-down” mechanism for overcoming the (irrational) resistance of a minority of creditors should be available.<sup>76</sup>

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70. See KILBORN, *supra* note 57, at 33; World Bank, *supra* note 60, ¶¶ 206–08.

71. See KILBORN, *supra* note 57, at 36–39.

72. See World Bank, *supra* note 60, ¶¶ 206–15.

73. See KILBORN, *supra* note 57, at 23–24; World Bank, *supra* note 60, ¶¶ 154–66; LONDON ECON., *supra* note 58, at 195–97.

74. See KILBORN, *supra* note 57, at 25–28; World Bank, *supra* note 60, ¶¶ 128–34.

75. See KILBORN, *supra* note 57, at 24–25; World Bank, *supra* note 60, ¶¶ 135–37.

76. See KILBORN, *supra* note 57, at 28–33; World Bank, *supra* note 60, ¶ 138; LONDON ECON., *supra* note 58, at 196–97.

*C. Earned Start: Asset Liquidation and Payment Plans*

Proper balance between the interests of creditors and debtors requires that creditors receive the benefit of their legitimate bargains, to the extent possible, by receiving a distribution of whatever value debtors reasonably can make available. Historically, and still today in Anglo-American consumer bankruptcy regimes, the principal method of expropriating value from debtors is the traditional one: appointing a trustee to liquidate the debtor's property (with the exception of protected categories of subsistence-supporting assets) and distribute that value (if any) to creditors.<sup>77</sup> Most overindebted individuals have few if any "non-exempt" assets of any value, however.<sup>78</sup> Though the range of categories of "exempt" property was historically quite constricted, there has been a notable expansion of these property protections in many states in recent decades, making it even less likely that the average debtor will have any asset value available for distribution to creditors.<sup>79</sup> Protections for the family home have been particularly controversial, sometimes allowing debtors to shield significant value from their creditors.<sup>80</sup> However, for homes encumbered by mortgages, legislatures around the world have shown a fairly consistent unwillingness to interfere with secured creditor rights.<sup>81</sup>

The primary source of value for most individuals is not current assets, but future earning capacity; that is, anticipated salary, wages, and other labor earnings. As a result, a crucial aspect of a proper debtor-creditor balance in European personal insolvency systems is an almost universal demand that debtors earn their fresh start by not only surrendering their nonexempt assets, but also subjecting themselves to a multiyear rehabilitation plan and endeavoring to make some amount of installment payment from future earnings to creditors.<sup>82</sup> Here again, given many debtors' strained personal expense-and-income structure, and the depressed economic factors (especially unemployment) that lead to most personal bankruptcies, even payment plans have produced surprisingly little value for cred-

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77. See World Bank, *supra* note 60, ¶ 220.

78. *Id.* ¶ 221.

79. *Id.* ¶ 227.

80. *Id.* ¶ 241.

81. *Id.*, ¶¶ 319–22, 326–27, 344–49.

82. See KILBORN, *supra* note 57, at 45; World Bank, *supra* note 60, ¶¶ 262, 310, 356; LONDON ECON., *supra* note 58, at 196.

itors.<sup>83</sup> The labor-intensive process of formulating and imposing payment plans on all debtors has therefore been criticized in recent years and remains somewhat controversial.<sup>84</sup>

Where payment plans are required, the terms of their formulation implicate sensitive policy issues. First, most modern personal insolvency regimes resist relegating the decision as to debt relief to majority creditor vote. The proper measure of expected sacrifice by debtors and creditors alike is a public policy issue that should be decided by a legislature and imposed by an administrator or court, not voted on by private creditors.<sup>85</sup> Second, uniform multiyear payment plans require a careful determination of the level of sacrifice expected of debtors and their families. Such plans should not extend beyond a moderate period (most often three to five years) and should not extract so much of the debtor's family income as to jeopardize their dignified existence.<sup>86</sup> The terms of such plans should apply uniformly to debtors within discrete categories of income level and family size. Leaving plan length or budget determination to administrative or judicial discretion has led inevitably to unrealistic and unworkable expectations of debtors, as well as wide disparities in treatment of similarly situated debtors based on nothing more than geography or idiosyncratic personal preference of the particular decision maker.<sup>87</sup>

### III. HISTORY AND DEVELOPMENT OF PERSONAL INSOLVENCY LAW IN RUSSIA

Over nearly one thousand years, Russian law has evolved through several distinct stages in its attitude toward insolvent debtors. Seeing the continuum is useful to understanding any given point along it; therefore, this Part surveys the deep history of Russian personal bankruptcy law. Pre-Revolutionary developments situate Russia squarely within a broader European

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83. See KILBORN, *supra* note 57, at 46–47; World Bank, *supra* note 60, ¶¶ 298–301, 313.

84. See KILBORN, *supra* note 57, at 45, 48; World Bank, *supra* note 60, ¶¶ 311–15.

85. World Bank, *supra* note 60, ¶¶ 284–90; LONDON ECON., *supra* note 58, at 196.

86. See KILBORN, *supra* note 57, at 49–58; World Bank, *supra* note 60, ¶¶ 262–65, 274.

87. See World Bank, *supra* note 60, ¶¶ 266–68, 284–88, 294; LONDON ECON., *supra* note 58, at 192–93, 197.

tradition of harsh attitudes toward defaulting debtors, as do post-Soviet movements toward rehabilitating debtors in the interests of macroeconomic societal health and well-being. The culmination of this process, in the adoption of the new personal bankruptcy law, is presented in this Part as well.

#### A. *The Rise and Fall of Bankruptcy Law in Old Russia*

Russia has a long and colorful history of laws dealing with defaulting debtors. The oldest surviving law code from ancient Rus', the *Russkaya Pravda*,<sup>88</sup> assigns monetary penalties to various crimes and infractions, to transition away from vendettas and blood feuds.<sup>89</sup> The oldest portion of this ancient law code, dating to 1019–1054 CE, begins with a listing of various crimes, ranging from murder to various forms of battery with various instruments and resulting injuries, and then moves to property crimes, including concealing a runaway slave and unauthorized use or theft of someone else's horse.<sup>90</sup> In this context, the fourteenth or fifteenth article<sup>91</sup> addresses defaulting debtors:

If somewhere someone seeks from another person the balance [of money owed him], but that person begins to resist, then he is to appear at an investigation before twelve men; and if he wrongfully did not give [the money] back, then he is [to return] the money [to its rightful owner], and [pay] three grivnas for the offense.<sup>92</sup>

How much was the monetary fine of three grivna worth? This was also the penalty for cutting off someone's finger, concealing someone's runaway slave, and riding someone's horse without

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88. See Lev Pushkarev & Natalia Pushkareva, *Russkaya Pravda*, ENTSYKLOPEDIYA KRUGOSVET, [http://www.krugosvet.ru/enc/istoriya/russkaya\\_pravda.html](http://www.krugosvet.ru/enc/istoriya/russkaya_pravda.html) (last visited Apr. 9, 2016).

89. See DANIEL H. KAISER, *THE LAWS OF THE RUS – TENTH TO FIFTEENTH CENTURIES* 15–19 (1992). This is a similar transition to the one observed in tribal laws throughout northern and western Europe in the late first millennium. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 52–55 (1983).

90. Pushkarev & Pushkareva, *supra* note 88; KAISER, *supra* note 89, at 15–19.

91. The original was not broken into articles, so various modern versions of the *Russkaya Pravda* are numbered differently.

92. KAISER, *supra* note 89, at 16, art. 14.

permission or stealing a horse, weapons, or clothing.<sup>93</sup> It is not clear how “wrongful” nonpayment was distinguished from “innocent” nonpayment.

Following a general trend in Europe in the twelfth and thirteenth centuries,<sup>94</sup> these monetary fines were replaced by a system of corporal punishment or coercion, in the case of debt enforcement called *pravyozh*.<sup>95</sup> Debtors whose defaults had been confirmed by judgment would be lined up daily (except for holidays) behind several bailiffs, who would proceed to hit the debtors on the calves with a stick for several hours until the judge emerged from the court.<sup>96</sup> In the mid-1500s, Ivan IV (the Terrible) imposed limits on the total term of the *pravyozh* process: one month for a debt of 100 rubles, and proportionally more or less time for larger or smaller debts.<sup>97</sup> This practice is reflected in the earliest monument of printed Russian Imperial law, the *Ulozhenie* of 1649.<sup>98</sup> Debtors whose insolvency was the result of *force majeure*, such as fire, cattle drowning, or theft, were to be given a forbearance of one to three years,<sup>99</sup> but after this time, nobles and their children were subject to *pravyozh*, followed by confiscation of land, serfs, and property to be applied to pay off their debts.<sup>100</sup> It could be worse: lower-level nobles with no property to pay off their debts were to be turned over to their creditors at the conclusion of the *pravyozh* process, and non-noble debtors were to be turned over immediately, as serfs to work off their debts<sup>101</sup> at a statutory rate of 5 rubles per

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93. See KAISER, *supra* note 89, at 16, arts. 7, 11–13.

94. See BERMAN, *supra* note 89, at 55.

95. See generally *Pravezh*, GREAT SOVIET ENCYCLOPEDIA (A.M. Prokhorov ed., 3d ed. 1970); *Pravezh*, 49 BROCKHAUS AND EFRON ENCYCLOPEDIA DICTONARY (1890–1907).

96. See *Pravezh*, *supra* note 95. The practice is memorialized in a Russian proverb, *v nogax pravdy net* (“[T]here is no truth in legs”). Sergey Armeyskov, #*Russian Saying: There Is No Truth in Legs*, RUSSIAN UNIVERSE BLOG (Dec. 16, 2013), <http://russianuniverse.org/2013/12/16/russian-saying/>.

97. Armeyskov, *supra* note 96.

98. *Ulozhenie* [Code] POLNOE SOBRANIE ZAKONOV ROSSIISKOI IMPERII [PSZ][Complete Collection of Laws of the Russian Empire], v. I, 1649, No. 1, ch. X, arts. 204, 261, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php).

99. See *id.* ch. X, art. 203.

100. *Id.* ch. X, arts. 204, 261–63 (allowing for a one-month reprieve from *pravyozh*, but not more); *id.* ch. X, art. 269 (calling for the sale of the stands and shops of merchant debtors).

101. The practice of debt slavery dates back to at least the *Sudebniki* of 1497 and 1550, both of which provided that a merchant who borrowed and

year for men, half that for women, and 2 rubles per year for the debtor's children older than ten (children younger than ten were not pressed into indentured servitude).

In 1718, Peter I (the Great) put an end to *pravyozh*, though indentured servitude continued.<sup>102</sup> To advance his program of naval development, male bankrupts were sent from throughout the Empire to the new capital, St. Petersburg, and conscripted into the navy, with suitable ones assigned to work on the ships, while women were sent to a St. Petersburg "spinning house" to make linens, and the elderly and minors were assigned to other work.<sup>103</sup> Debtors were fed the same way as prisoners, and for their work, they were credited one ruble per month (a significant raise over the earlier 5 rubles per year, now equal for men and women) until their debts were paid off.<sup>104</sup>

The official attitude toward debtors reached its nadir in December 1740 with the announcement of the first of many laws called "Charter on Bankrupts."<sup>105</sup> This first charter expressed heartfelt concern for subjects who had been cast into ruin by bankrupts' failing to pay their debts, and it therefore established the first discrete system for dealing with such failures.<sup>106</sup>

lost money or goods and could not repay would be offered an installment plan (without interest) if the loss were no fault of his own, but if the merchant lost the value given by drinking or "some other foolishness" or simply "in the absence of circumstances beyond the control of man," he would be handed over to the creditor as a debt slave "to make up the loss." See HORACE W. DEWEY, MUSCOVITE JUDICIAL TEXTS: 1488–1556, at 19, 71 (1966) (translating article 55 of the *Sudebnik* of 1497 and article 90 of the *Sudebnik* of 1550). Statutory serfdom paid men 5 rubles per year, women half that, and children older than ten 2 rubles. Ulozhenie [Code], *supra* note 98, ch. X, arts. 204, 206, 266; *id.* ch. XX, arts. 39–40. Children younger than ten were not pressed into indentured servitude. *Id.*

102. See *Zakon o posylke prestupnikov muzheska pola na galery, a zhenshchin na priadil'nyi dvor, dlya zarabotki sostoyashchix na nix kazennyx nedoimok i chastnyx dolgov i vzysskanii* [Law on Sending Male Criminals to the Galleys, and Women to the Spinning House, for Working Off State Debts Held by Them, as well as Private Debts and Demands] POLNOE SOBRANIE ZAKONOV ROSSIYSKOI IMPERII [PSZ] [Complete Collection of Laws of the Russian Empire], v. V, 1718, No. 3140, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php).

103. *Id.*

104. *Id.*

105. *Ustav o bankrotax* [Charter on Bankrupts], POLNOE SOBRANIE ZAKONOV ROSSIYSKOI IMPERII [PSZ] [Complete Collection of Laws of the Russian Empire], v. XI, 1740, No. 8300, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php).

106. See *id.* (introductory paragraph).

Debtors who had fallen on hard times through no fault of their own (e.g., through unforeseeable and unavoidable fire, theft, foreign invasion, or another's bankruptcy), were to be spared public sanction but held under arrest until their assets were sold and distributed.<sup>107</sup> Debtors whose distress was caused by their own fault (including carelessness and continuing to trade with insufficient capital), however, were to be subject to "the heaviest punishment"; that is, death by hanging "as an example to others."<sup>108</sup> Luckily for debtors, this law apparently never received formal status as a law and therefore had very little influence.<sup>109</sup>

The first "Charter on Bankrupts" to officially become law and enjoy wide application was adopted in 1800.<sup>110</sup> This law for the first time drew a formal distinction between the bankruptcies of merchants<sup>111</sup> and nonmerchants (nobles and higher and lower aristocrats by birth or civil service).<sup>112</sup> The law further distinguished three types of bankruptcy: accidental, negligent, and malicious.<sup>113</sup> Accidental bankrupts were designated by a special, non-judgmental term, *upadshii* (fallen), while the others were called "bankrupts."<sup>114</sup>

While the fate of insolvent merchants was left to a vote of creditors,<sup>115</sup> nonmerchant cases were administered by a court.<sup>116</sup>

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107. *Id.* arts. 1–21.

108. *Id.* arts. 1–3, 31–36.

109. See M.V. Teliukina, *O nesostoyatel'nosti (bankrotstve)*, in KOMMENTARI K FEDERAL'NOMU ZAKONU (Iu P. Orlovskii ed., 1998); Irina Aleksandrovna Shcherbovich, *K voprosu ob istochnikakh regulirovaniya konkursnogo protsessa v Rossii v XIX veke* [, BULL. ADYGEYA STATE UNIVERSITY 2 (2007), <http://cyberleninka.ru/article/n/k-voprosu-ob-istochnikah-regulirovaniya-konkursnogo-protsessa-v-rossii-v-xix-veke.pdf>.

110. Ustav o bankrotax [Charter on Bankrupts], POLNOE SOBRANIE ZAKONOV ROSSIJSKOI IMPERII [PSZ] [Complete Collection of Laws of the Russian Empire], v. XXVI, 1800, No. 19692, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php); see also Teliukina, *supra* note 109 (noting the wide application of the 1800 law).

111. See *id.* pt. I, arts. 1–171.

112. See *id.* pt. II, arts. 87–111.

113. See *id.* pt. I, arts. 130, 132, 135, 138.

114. See *id.* pt. I, art. 131.

115. See *id.* pt. I, arts. 132, 133, 136, 139 (determining category of debtor by majority vote of creditors by number and volume of debt, discharging—or wiping out—deficiency for faultless merchant debtors, though not for others, and punishing malicious merchant bankrupts as public thieves). For a fascinating exploration of merchant bankruptcy cases in nineteenth century Russia, see the magnificent dissertation by Sergei Antonov, *Law and the Culture*



If a debt deficiency remained after liquidation of the debtor's available assets, the 1800 Charter put an end to indentured servitude, leaving the debtor's fate instead to the court's evaluation of the debtor's written evidence of the circumstances leading to the insolvency<sup>117</sup>: In what must have been the extraordinarily rare event that the debtor qualified as an *upadshii* (accidental debtor) by convincing the court that insolvency had been caused by fire, flood, theft, foreign invasion, or "other unfortunate circumstances that [the debtor] could neither foresee nor avoid," such a debtor was subject to no further punishment or debt enforcement.<sup>118</sup> This may be the first (theoretical) non-merchant, court-ordered bankruptcy discharge in modern history.<sup>119</sup>

Judging by accounts of merchant bankruptcies, it seems to have been the rare exception that a bankruptcy was established as "accidental."<sup>120</sup> A list of debtors imprisoned in Moscow in the 1820s included five individuals who had borrowed several hundred rubles to finance their daughters' weddings, several ruined by illness, and a man who had borrowed 3000 rubles to ransom himself from serfdom.<sup>121</sup> These people, and similar honest but unfortunate debtors, would be branded negligent "bankrupts" and relegated to a term of imprisonment for five years (so long as creditors were willing to pay 50–150 rubles per year for the debtor's maintenance).<sup>122</sup> The debtor could secure early release by paying off the debt with an inheritance or

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of Debt in Moscow on the Eve of the Great Reforms, 1850–1870 (2011) (unpublished Ph.D. dissertation, Columbia University) (on file with Columbia University Academic Commons), <http://academiccommons.columbia.edu/catalog/ac%3A132251>.

116. See Charter on Bankrupts, *supra* note 110, pt. II, art. 98.

117. See *id.*

118. See *id.* pt. II, art. 99.

119. See Jason Kilborn, *Bankruptcy in Russia, 1740-1800, and the First Non-Merchant Discharge!*, CREDIT SLIPS BLOG (July 23, 2015, 11:51 AM), <http://www.creditslips.org/creditslips/2015/07/bankruptcy-in-russia-1740-to-1800-from-death-to-discharge.html>.

120. See Antonov, *supra* note 115, at 117.

121. *Id.* at 119–20.

122. See Ustav o bankrotax [Charter on Bankrupts], *supra* note 110, pt. II, art. 100. It was quite common that creditors were unwilling to pay for the debtor's maintenance in jail, so insolvent debtors often escaped imprisonment this way. See Antonov, *supra* note 115, at 232.

other income.<sup>123</sup> Good-hearted creditors could also vote to reduce the term of imprisonment proportionally—for instance, a vote of one-fifth of the creditors by volume of unpaid debt would reduce the term by one year, two-fifths by two years, and so on.<sup>124</sup>

These general contours of personal bankruptcy law persisted largely unchanged until the 1917 Revolution. The separation of merchant and nonmerchant bankruptcies was later formalized, as new commercial courts administered merchant bankruptcies pursuant to rules in the Code of Commercial Procedure,<sup>125</sup> while ordinary courts administered nonmerchant insolvency with a few specific alternate and supplemental rules in the Code of Civil Procedure.<sup>126</sup> Imprisonment of insolvent debtors continued to be the end result of these procedures,<sup>127</sup> with

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123. See *Ustav o bankrotax* [Charter on Bankrupts], *supra* note 110, pt. II, art. 102.

124. See *id.* pt. II, art. 106. Debtors were also commonly freed by operation of periodic celebratory amnesties and creditor agreements after charitable committees paid off part of their debts. See Antonov, *supra* note 115, at 233–35, 256–67.

125. See *Ustav sudoproizvodstva trgovago* [Code of Commercial Procedure] *SVOD ZAKONOV ROSSIISKOI IMPERII* [SV] [Digest of Laws of the Russian Empire], v. XI, pt. II, arts. 384–534, <http://civil.consultant.ru/reprint/books/253/1.html>; see also *Uchrezhdenie Kommercheskix Sudov, i Ustav ix sudoproizvodstva* [Establishment of Commercial Courts, and Code of their Procedure] *POLNOE SOBRANIE ZAKONOV ROSSIISKOI IMPERII* [PSZ] [Complete Collection of Laws of the Russian Empire], v. VII, 1832, No. 5360, art. 31, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php); *Ustav o trgovoi nesostoyatel'nosti* [Code of Commercial Insolvency] *POLNOE SOBRANIE ZAKONOV ROSSIISKOI IMPERII* [PSZ] [Complete Collection of Laws of the Russian Empire], v. VII, 1832, No. 5463, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php).

126. See *Ustav grazhdanskago sudoproizvodstva* [Code of Civil Procedure] *SVOD ZAKONOV ROSSIISKOI IMPERII* [SZ] [Digest of Laws of the Russian Empire], v. XVI, pt. I, art. 1400, app. III, <http://civil.consultant.ru/reprint/books/238/309.html#img310>; *Po proektu vremennyx pravil o poryadke proizvodstva del o nesostoyatel'nosti v sudebnyx ustanovleniyax, obrazovannyx po Uchrezhdeniyu 20 Noyabrya 1864 goda* [On the Project of Temporary Rules of Procedure for Insolvency Cases in Judicial Structures Formed by the Establishment of 20 November 1864] *POLNOE SOBRANIE ZAKONOV ROSSIISKOI IMPERII* [PSZ] [Complete Collection of Laws of the Russian Empire], v. XXXXIII, 1868, No. 46067, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php).

127. Even after imprisonment as a debt enforcement method was abolished in 1879, it remained valid in insolvency cases. See *Ob otmene lichnago zaderzhaniya, kak sposoba vzyskaniya s neispravnyx dolzhnikov* [On the Aboli-

nonmerchants regaining their freedom after a prison term of six months to five years,<sup>128</sup> or by creditor agreement (or creditor failure to advance the established costs of at least one month's food provisions for the imprisoned debtor).<sup>129</sup>

Like other European statutes of the time, these bankruptcy provisions were concerned all but exclusively with satisfaction of creditors and coercing as much payment as possible from recalcitrant debtors. While relief for debtors from overwhelming debt was a concept that would arise only much later in Europe, the turn-of-the-century Russian law contained one ray of hope: once a debtor had served the prison term for unpaid debt, the debtor could no longer be imprisoned for nonpayment of that debt.<sup>130</sup> No concept of discharge existed, however, so the unpaid debt could still be enforced against the debtor's future property.

### *B. Insolvency Law in Modern Russia and the Long Wait for "Citizen" Bankruptcy*

The Revolution put an end to market capitalism and any notion of a need for bankruptcy legislation for individuals from November 1917 to the fall of the Soviet Union in December 1991.<sup>131</sup> Almost immediately thereafter, bankruptcy law was among the very first orders of business in the new Russian Federation. In June 1992, President Yeltsin issued an interim

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tion of Personal Detention as a Means of Enforcement against Incurable Debtors] POLNOE SOBRANIE ZAKONOV ROSSIISKOI IMPERII [PSZ] [Complete Collection of Laws of the Russian Empire], v. XXXXIV, 1879, No. 59374, [http://www.nlr.ru/e-res/law\\_r/coll.php](http://www.nlr.ru/e-res/law_r/coll.php) (preserving imprisonment in insolvency cases generally, both commercial and civil).

128. The unpaid debt had to exceed 100 rubles for imprisonment to be imposed, and the term of imprisonment was determined by the court on a sliding scale from six months to five years depending upon the size of the debt, from 100 to more than 100,000 rubles. *Ustav grazhdanskago sudoproizvodstva* [Code of Civil Procedure], *supra* note 126, arts. 34, 36.

129. *Id.* arts. 57–67.

130. *Id.* art. 65.

131. Some vestige of insolvency law remained in the Soviet Civil Code in the 1920s and 1930s, though addressing only the insolvency of state enterprises and collectives. After World War II, the notion of a planned national economy largely excluded any purpose for bankruptcy as a concept, even for enterprises, so the concept of bankruptcy was removed from Soviet law in the 1960s. See S.Yu. Zhuravlyov, *Istoriya razvitiya zakonodatel'stva o bankrotstve v Rossii* (2007) (unpublished manuscript) (on file with author at Nizhegorodskaya Academy); *Bankrotstvo*, in 5 BROCKHAUS AND EFRON ENCYCLOPEDIA DICTONARY, *supra* note 95.

edict on insolvent state enterprises, and the legislature adopted the first post-Soviet Russian bankruptcy law later that year.<sup>132</sup>

As previously discussed,<sup>133</sup> lawmakers were not yet faced with a pressing problem of personal overindebtedness yet, as the consumer credit market was only in the earliest stages of development. Not surprisingly, then, the 1992 bankruptcy law addressed only business insolvency; that is, bankruptcies of enterprises and individual entrepreneurs.<sup>134</sup> This law broke decisively from the past with a major modern innovation: Debts related to individual entrepreneurial activity not satisfied by the proceeds of liquidation of the debtor's nonexempt assets would be discharged.<sup>135</sup> This crucial provision was enshrined in the Civil Code, as well, in a freestanding provision on "Insolvency (bankruptcy) of individual entrepreneurs."<sup>136</sup> Russian lawmakers thus enacted the first major characteristic of a modern personal insolvency system: a discharge of unpaid debt following bankruptcy proceedings, at least for entrepreneurs.

The economic situation had little time to evolve before the second Russian bankruptcy law took the stage in 1998. This law for the first time rhetorically revived the possibility of bankruptcy of a nonentrepreneur individual (*grazhdanin*, "citizen").<sup>137</sup> Personal bankruptcy would remain rhetoric only, however, until coordinating amendments were made to the Civil

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132. Federal'nyi Zakon O nesostoyatel'nosti (bankrotstve) No. 3929-1 [Federal Law on Insolvency (Bankruptcy) No. 3929-1], VEDOMOSTI S'EZDA NARODNYKH DEPUTATOV ROSSIISKOI FEDERATSII I VERKHOVNOGO SOVETA ROSSIISKOI FEDERATSII [VED. RF] [Bulletin of the Congress of People's Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1992, No. 1, Item 6. For an overview of the presidential edict and the new law, see Campbell, *supra* note 5, at 357–69; Paul R. Williams & Paul E. Wade, *Bankruptcy in Russia: The Evolution of a Comprehensive Russian Bankruptcy Code*, 21 REV. CENT. & E. EUR. L. 511, 520–30 (1995).

133. See *supra* notes 5–7 and accompanying text.

134. See Campbell, *supra* note 5, at 362.

135. See Williams & Wade, *supra* note 132, at 530 (citing articles 35–36 of the 1992 Law).

136. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 25(4) (Russ.) (as adopted Nov. 30, 1994).

137. Federal'nyi Zakon No. 6-FZ RF o nesostoyatel'nosti (bankrotstve) [Federal Law No. 6-FZ of the Russian Federation on Insolvency (Bankruptcy)], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Collection of Legislation of the Russian Federation] 1998, No. 2, Item 222. For an overview of this law, see Tom Cummings, *Survey of East European Law: Bankruptcy Law Reform in Russia*, 4 PARKER SCH. J. E. EUR. L. 379, 390–93 (1997).

Code, which envisioned only bankruptcy for individual entrepreneurs.<sup>138</sup> In early 2000, the relatively short-lived insolvency regulator, the Federal Service on Financial Rehabilitation and Bankruptcy,<sup>139</sup> presented a draft bill to the Ministries of Labor and Justice to expand the Civil Code provision to apply to ordinary citizens,<sup>140</sup> but no major impetus existed yet for such a revision. The market for personal credit was just beginning what would be its massive expansion,<sup>141</sup> and legislators had larger unfinished business in the general bankruptcy law to attend to.

The third time is a charm, and Russia's third and currently effective bankruptcy law emerged in 2002.<sup>142</sup> This law was designed to address several technical deficiencies of its predecessor, particularly an enhanced and more rigorous definition of "insolvency" to prevent small creditors (especially a debtor-company's competitors) from initiating bankruptcy cases to destroy or take over relatively healthy businesses.<sup>143</sup> Personal (nonentrepreneur) bankruptcy was again acknowledged in concept, but still shelved pending the adoption of amendments to other federal laws, most notably the Civil Code.<sup>144</sup>

In mid-2004, as the growth rate of overdue consumer credit churned past the dizzying growth rate of total outstanding consumer debt,<sup>145</sup> the need for personal bankruptcy legislation gained the spotlight. The Department of Corporate Management of the Ministry of Economic Development was assigned

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138. See Cummings, *supra* note 137, at 393.

139. On the history and fate of this Service, see *infra*, note 202.

140. See Maksim Builov, *Bankrot po sobstvennomu zhelaniyu*, KOMMERS. (Mar. 15, 2000), <http://www.kommersant.ru/doc/24119>.

141. See *supra* note 8 and accompanying text.

142. Federal'nyi Zakon No. 127-FZ RF o Nestostoyatel'nosti (Bankrotstve) [Federal Law No. 127-FZ of the Russian Federation on Insolvency (Bankruptcy)], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Collection of Legislation of the Russian Federation] 2002, No. 43, Item 4190 [hereinafter Law 127-FZ].

143. See Sidney B. Brooks, *The International Scene: Three's a Charm? Russia Adopts Third Bankruptcy Law in 10 Years*, AM. BANKR. INST. J., June 2002, at 22, 22; Sabrina Tavernise, *Using Bankruptcy as a Takeover Tool; Russian Law Puts Healthy Companies at Risk*, N.Y. TIMES (Oct. 7, 2000), <http://www.nytimes.com/2000/10/07/business/international-business-using-bankruptcy-takeover-tool-russian-law-puts-healthy.html>.

144. See Law 127-FZ, *supra* note 142, art. 231(2).

145. See *supra* notes 36–37 and accompanying text.

responsibility for bankruptcy matters generally,<sup>146</sup> and it immediately set to work on a personal bankruptcy bill.<sup>147</sup> It pressed its vision for personal bankruptcy law as a court-supported forum for facilitating individual debtors' negotiations to restructure their unsustainable debts and, if the debtor were declared bankrupt, to obtain a discharge, "having transferred to creditors [the debtor's] property and a part of [the debtor's] income."<sup>148</sup>

The Ministry's proposal broadly reflected European approaches to personal insolvency. Indeed, it was based in part on an international survey of what the Ministry touted as "sufficiently successful mechanisms" of personal insolvency resolution, specifically mentioning structures in the United States, Germany, and Sweden.<sup>149</sup> The essence of the proposal would survive an arduous legislative process and become Russia's new personal bankruptcy law. It included a subjective "insolvency" entry criterion,<sup>150</sup> an option for debtors with regular income to propose to creditors a trustee-administered plan for

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146. See Iulya Proskuryakova, *Sezon oxoty na bankrotov*, ROSSIISKAYA GAZETA (Nov. 16, 2004, 5:00 AM), <http://rg.ru/2004/11/16/bankrotstvo.html>.

147. *Reabilitatsionnyye protsedury, primenyayemye v otnoshenii grazhdan-dolzhnikov*, MINEKONOMRAZVITIYA ROSSII (Sept. 2, 2004), [http://economy.gov.ru/minec/activity/sections/CorpManagment/bankruptcy/doc20040901\\_08](http://economy.gov.ru/minec/activity/sections/CorpManagment/bankruptcy/doc20040901_08).

148. *Id.*

149. See *Poyasnitel'naya zapiska k projektu federal'nogo zakona "O reabilitatsionnykh protsedurax, primenyayemykh v otnoshenii grazhdanina-dolzhnika"*, MINEKONOMRAZVITIYA ROSSII (Nov. 25, 2009), <http://economy.gov.ru/minec/activity/sections/CorpManagment/bankruptcy/doc1259162688648> (unpublished explanatory note to an early Ministry proposal, which remained almost verbatim the same through several iterations, including the final bill that became the new law); see also *Aktual'nye voprosy sovershenstvovaniya zakonodatel'stva o nesostoyatel'nosti (bankrotstve) v chasti vvedeniya reabilitatsionnykh protsedur v otnoshenii grazhdanina-dolzhnika*, GARANT (Dec. 11, 2007), <http://www.garant.ru/action/interview/10246/> [hereinafter MER Interview] (online interview with acting director of Department of Corporate Management of Ministry of Economic Development, Dmitrii Skripichnikov, referencing international practice at several different points).

150. See *Proyekt Federal'nogo zakona "O reabilitatsionnykh protsedurax, primenyayemykh v otnoshenii grazhdanina-dolzhnika"* [Project/Bill of a Federal Law "On Rehabilitative Procedures Applied with Respect to a Citizen-Debtor], arts. 3, 9(3), 10(1), MINEKONOMRAZVITIYA ROSSII (Nov. 25, 2009), <http://economy.gov.ru/minec/activity/sections/CorpManagment/bankruptcy/doc1259162688648>.

restructuring their debts over five years,<sup>151</sup> and a limited possibility for the court to impose the debtor's "best efforts" plan on creditors.<sup>152</sup> Alternatively, the law permitted the court to declare the debtor bankrupt, order a trustee to liquidate the debtor's nonexempt assets, including income in excess of the statutory subsistence minimum earned during liquidation, distribute the proceeds to creditors, and automatically discharge most remaining debts.<sup>153</sup> Debtors declared bankrupt would incur an affirmative obligation to inform lenders of the bankruptcy for the next five years, and they could seek no further bankruptcy relief during that same five-year period.<sup>154</sup> To allow the commercial courts to prepare for these new cases, the bill's effective date was set at one year after passage into law.<sup>155</sup>

For eight years, this perfectly sound project went in circles. Round after round of intragovernmental review and approval was followed by inexplicable delays and orders for reconsideration, the result of political resistance from a powerful bank lobby, along with a good measure of fear of the unknown.<sup>156</sup> For example, one well-respected, prominent news source reported that under U.S. personal bankruptcy law, individual debtors lose the right to borrow in the future, and a debtor who knowingly borrowed more than his or her income could be thrown in jail—which is at best misleading, and in all but the most excep-

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151. *Id.* arts. 16–20.

152. *Id.* art. 21(2).

153. *Id.* arts. 21(4), 29–33.

154. *Id.* art. 35.

155. *Id.* art. 39; see "Fiziki" smogut bankrotit'sya, FINANS (Nov. 17, 2009), <http://www.finansmag.ru/news/44992>.

156. See, e.g., *Minekonomrazvitiya vernulos' k zakonu o bankrotstve fizicheskix lits*, NEWSRU (Apr. 11, 2011, 8:49 AM), <http://www.newsru.com/finance/11apr2011/bankrupsy.html>; *Bankrot po sobstvennomu zhelaniyu*, IZVESTIA (Apr. 11, 2011, 12:28 AM), <http://izvestia.ru/news/373510> (noting intragovernmental opposition in 2008 due to an inadequate definition of "insolvency" and an overly generous list of exempt property); *Banki protiv zakona a bankrotstve fizicheskix lits*, NEWSLAND (Oct. 19, 2011, 1:03 PM), <http://newsland.com/news/detail/id/805768/>; *MER Interview*, *supra* note 149 (noting common fears born of a lack of understanding of the essence of the bankruptcy process); *V Gosdume uzhe obsuzhdayut zakonoproekt o bankrotstve fizlits*, PRAVO.RU (Mar. 22, 2010, 10:53 AM), <http://www.pravo.ru/news/view/26648/> (noting a "round table" discussion following a delay in 2010 for consideration of the economic impact of the introduction of the institution of personal bankruptcy).

tional case, simply false.<sup>157</sup> The bank lobby was particularly active at every turn in opposing any notion of personal insolvency relief.<sup>158</sup>

Finally, in July 2012, the political stars began to align, and the first personal bankruptcy bill that would become law was introduced in the State Duma.<sup>159</sup> After a supportive first reading,<sup>160</sup> however, the bill ground to a halt for another two years while the Committee on Property considered hundreds of amendments, some quite substantive (as discussed below<sup>161</sup>).<sup>162</sup>

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157. See Yulia Vasil'eva, *Grazhdanin bankrot: Pravitel'stvo rassmotrit zakon o bankrotstve fizicheskix lits*, ROS. GAZ. (Nov. 7, 2007, 6:00 AM), <http://www.rg.ru/2007/11/07/bankrotstvo.html>.

158. See, e.g., Tai Adelaja, *The Russian Government Gives Green Light to a New Consumer Bankruptcy Law*, RUSSIA PROFILE (Apr. 2, 2012), <http://russiaprofile.org/business/56857.html> (quoting Sergei Gavrilov, chair of the State Duma Committee on Property, criticizing the obstructionism of bank lobbies in the consideration of personal bankruptcy law, and noting opposition from the Finance Ministry); *Banki opasayutsya bankrotsta fizicheskix lits*, FINROSSIYA (July 9, 2013), <http://finrussia.ru/news/show/banki-opasajutsja-bankrotstva-fizicheskix-lic-130709005> (noting opposition from banks and Ministry of Finance); Alexander Bayazitova, *Bankrotstvo teryaet fizicheskoe litso*, KOMMERS. (July 8, 2013), <http://kommersant.ru/doc/2228112> (noting that the bank lobby expressed concern in a meeting with President Putin that the law was “untimely”).

159. *Zakonoproekt No. 105976-6, O vnesenii izmenenii v Federal'nii zakon “O nesostoyatel'nosti (bankrotstve)” i ot del'nye zakonodatel'nye akty Rossiiskoi Federatsii v chasti regulirovaniya reabilitatsionnykh protsedur, primenyaemykh v otnoshenii grazhdanina-dolzhnika* [Draft Law No. 105976-6, *On the Introduction of Amendments to the Federal Law “On Insolvency (Bankruptcy)” and Certain Legislative Acts of the Russian Federation Regulating Rehabilitation Procedures Applied with Respect to a Citizen-Debtor*], [http://asozd2.duma.gov.ru/main.nsf/\(SpravkaNew\)?OpenAgent&RN=105976-6](http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=105976-6) (last updated Oct. 22, 2015) [hereinafter *Legislative History*] (the official legislative record of the bill, with attached documents).

160. The usual legislative process in Russia is broken into several steps, most importantly a series of three “readings” of a bill in the lower house of the legislature, the State Duma. The first reading simply solicits general support of the bill in concept. Preparation for the second reading involves a probing examination and often substantial revision of the pending bill by the official assigned committee (in this case, the Committee on Property), and the second reading passes on these amendments. A bill is ultimately adopted by the Duma in a formal third reading, which is little more than pro forma if the second reading process has been carried out properly. The bill then must be approved after brief consideration by the upper house, the Federation Council, culminating in the final step, signature by the President. See generally WILLIAM E. BUTLER, *RUSSIAN LAW* 8.140–62 (3d ed. 2009).

161. See *infra* Part III.C.1.



Once revised and back on the rails, the bill was on a fast track to final adoption by the Duma in a third reading on December 19, 2014, approval by the Federation Council on December 25, 2014,<sup>163</sup> and signature by President Putin on December 29, 2014,<sup>164</sup> as Law No. 476-FZ.<sup>165</sup> But the Odyssey wasn't over yet. In a last-minute *volte face* on the court system to be assigned responsibility for these new cases<sup>166</sup> and a delayed effective date for the new law, the Duma repealed most of Law No. 476-FZ and reenacted it in slightly revised form in June 2015 as an appendage to a new Law No. 154-FZ, signed on June 29, 2015, effective October 1, 2015.<sup>167</sup>

### *C. The New Russian Personal Insolvency Regime: Lessons Learned and Not Learned*

At last, this section examines the specifics of the new personal bankruptcy provisions, which were incorporated by revision

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162. See *Legislative History*, *supra* note 159 (showing the second reading period stretching from first reading approval on November 14, 2012, to the proposed adoption of the bill on second reading on November 14, 2014).

163. Note that Russia officially celebrates Orthodox Christian holidays, so the last two weeks of December are ordinary work days, while the first week-and-a-half of the New Year is an extended holiday period. See *Perechen' nerabochix prazdnichnyx dnei i perenesyonnyx vyhodnyx dnei v 2015 godu*, CENT. BANK RUSS. FED'N, [http://cbr.ru/pw.aspx?file=/other/holidays\\_2015.htm](http://cbr.ru/pw.aspx?file=/other/holidays_2015.htm) (last visited Mar. 19, 2016).

164. See *Legislative History*, *supra* note 159.

165. Federal'nyi Zakon RF No. 476-F o vnesenii izmenenii v federal'nii zakon "o nesostoyatel'nosti (bankrotstve)" i ot del'nye zakonodatel'nye akty rossiiskoi federatsii v chasti regulirovaniya reabilitatsionnyx protsedur, primenyaemyx v otnoshenii grazhdanina-dolzhnika [Federal Law of the Russian Federation No. 476-F on the Introduction of Amendments to the Federal Law "On Insolvency (Bankruptcy)" and Certain Legislative Acts of the Russian Federation Regulating Rehabilitation Procedures Applied with Respect to a Citizen-Debtor], ROS. GAZ. (Dec. 31, 2014), <http://publication.pravo.gov.ru/Document/View/0001201412290042>.

166. See *infra* note 187.

167. Federal'nyi Zakon RF No. 154-FZ "Ob uregulirovanii osobennostei nesostoyatel'nosti (bankrotstva) na territorii Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya i o vnesenii izmenenii v ot del'nye zakonodatel'nye akty Rossiiskoi Federatsii" [Federal Law of the Russian Federation No. 154-FZ "On the Regulation of the Particulars of Insolvency (Bankruptcy) Within the Territory of the Republic of Crimea and the Federal City of Sevastopol and on the Introduction of Amendments to Certain Legislative Acts of the Russian Federation"], arts. 2-4, 6-14, ROS. GAZ. (July 3, 2015), <http://publication.pravo.gov.ru/Document/View/0001201506300005>.

into the Civil Code<sup>168</sup> and the existing general bankruptcy law, in particular Part X.<sup>169</sup> Before laying out the operation of the new regime, it is worth pausing to address why Russia departed from its historically debtor-punitive and creditor-centric bankruptcy policy. What role did lawmakers hope this new regime would play? It turns out that the answers for Russia resonate perfectly with the answers provided by other European lawmakers as personal bankruptcy has developed there over the past thirty years: These laws are not motivated so much by compassion for human suffering or pity for poor debtors, but more by a desire to establish a more rational balance among the economic interests of creditors, debtors, and most importantly, the society on which their actions have a far-reaching impact.<sup>170</sup> Lawmakers hoped with this new law to “substantially reduce societal tension” created by unregulated defaults.<sup>171</sup>

It is both telling and fitting that this project was assigned to the ministry in charge of economic development, as economic concerns were the primary driving forces behind the Russian law, just as they had been elsewhere in Europe. Lawmakers were concerned that a sudden explosion in the volume of consumer credit, especially credit in default, was undermining consumer confidence and purchasing power, “not at all stimulating the business activity of the populace.”<sup>172</sup> Creditors also

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168. *Id.* art. 2 (amending art. 25 to encompass the bankruptcy of all individuals, entrepreneur or not).

169. *Id.* art. 6.

170. See World Bank, *supra* note 60, ¶¶ 56–111; Jason J. Kilborn, *Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice*, in CONSUMER CREDIT, DEBT & BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 307, 308–14 (Johanna Niemi, et. al eds., 2009); *MER Interview*, *supra* note 149 (expressing Russian lawmakers’ goal to benefit not just debtors or creditors, but both of these groups and society as well).

171. See Sergei Gurkin, *Gosduma prinyala zakon o bankrotstve fizicheskix lits v pervom chtenii*, DP (Nov. 14, 2012, 6:37 PM), [http://www.dp.ru/a/2012/11/14/gosduma\\_prinjala\\_zakon\\_o\\_b/](http://www.dp.ru/a/2012/11/14/gosduma_prinjala_zakon_o_b/) (quoting Sergei Gavrilov, chair of the State Duma Committee on Property, the committee responsible for the personal bankruptcy bill).

172. *Poyasnitel'naya zapiska k projektu federal'nogo zakona "O vnesenii izmenenii v Federal'nii zakon 'O nesostoyatel'nosti (bankrotstve)'" i otдел'nye zakonodatel'nye akty Rossiiskoi Federatsii v chasti regulirovaniya reabilitatsionnyx protsedur, primenyaemyx v otnoshenii grazhdanina-dolzhnika* [*Explanatory Note to the Draft Bill of a Federal Law "On the Introduction of*

suffered, as the ordinary debt collection process favored the aggressive and sophisticated, imposed unnecessary and unproductive costs on creditors, and led to “quasi-criminal means of collecting debts,” further increasing the costs of debt service.<sup>173</sup> Banks are better off, lawmakers reasoned, allowing an insolvent debtor “to preserve property and social status with a restructuring.”<sup>174</sup> In any case, banks needed to improve their accountability and stability by cleaning their balance sheets of hopelessly uncollectible consumer debts.<sup>175</sup> The law’s primary function was to “stimulate citizen-debtors and their creditors to civilized methods of restructuring debt” and to allow Russian law “to conform to market realities.”<sup>176</sup> Even if a restructuring is not possible, the bankruptcy process at least allowed for a final solution for debtors “to be freed from debts, having surrendered [their] property for satisfaction of creditors.”<sup>177</sup>

This following section first presents the framework of the personal bankruptcy regime under the new Russian law, with a few predictions of how it will likely operate on the ground. It then proceeds to evaluate this framework in light of the international best practices discussed above,<sup>178</sup> as well as potential practical complications in the specific context of Russia today.

### 1. Presentation: An Integrated Regime Along European Lines

The structure of the law tracks other European models, with some interesting twists. Some of these become clear only from a close cross-referencing of distant provisions, as well as consid-

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*Amendments to the Federal Law ‘On Insolvency (Bankruptcy)’ and Certain Legislative Acts of the Russian Federation Regulating Rehabilitative Procedures Applied with Respect to a Citizen-Debtor”* (2012) [hereinafter *Explanatory Note*], in *Legislative History*, *supra* note 159.

173. *Id.*

174. *Id.*

175. See *Zakliucheniye Obshchestvennoi palaty RF 2* (Aug. 7, 2012), in *Legislative History*, *supra* note 159; *Zakliuchenie otvetsvennogo kommiteta (Komitet Gosudarstvennoi Dumy o voprosam sobstvennosti)* 3–4 (Sept. 20, 2012), in *Legislative History*, *supra* note 159.

176. *Explanatory Note*, *supra* note 172, at 5; see also *MER Interview*, *supra* note 149 (“[I]n everyone’s life, situations happen when, by the force of one or another reason, people lose their job, an economic downturn occurs. Citizens are rendered incapable of fulfilling obligations they have undertaken . . . . In such situations, a compromise option should be found.”).

177. *Explanatory Note*, *supra* note 172, at 2.

178. See *supra* Part II.

eration of the conditions on the ground in Russia today. This section will make these connections and reveal the likely operation of the new law in action.

*a. Case Initiation/Access*

In Russia, as elsewhere, a personal bankruptcy case can be initiated either the traditional way, that is, *against* an individual debtor by his or her creditors as a means of debt collection, or the modern way, *by* the debtor as a means to obtaining relief.<sup>179</sup> Given the availability of relatively effective, individualized debt collection processes, individual creditors have little incentive to use the collective vehicle of bankruptcy as a means of pursuing their individual claims, but experience elsewhere in Europe suggests that many Russian creditors (primarily banks) will likely initiate bankruptcy cases against individual debtors.<sup>180</sup>

Many petitions, and probably most, however, will be filed by debtors seeking relief from their debts (this article will therefore largely ignore the specific rules on creditors' petitions). Because Russia lacks an organized system of consumer debt advice or counseling services,<sup>181</sup> one of two things will most likely

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179. Federal'nyi Zakon No. 127-FZ RF o Nestostoyatel'nosti (Bankrotstve) [Federal Law No. 127-FZ of the Russian Federation on Insolvency (Bankruptcy)], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Collection of Legislation of the Russian Federation] 2002, No. 43, Item 4190, art. 213.3(1).

180. See Elena Pashutinskaya, *Bankrot platit' obyazan*, KOMMERS. (June 25, 2015), <http://kommersant.ru/doc/2753811> (noting a prediction that banks will soon use bankruptcy rather than individual enforcement procedures in most or all debt collections cases). For a discussion of this theoretical conundrum and recent European experience with creditor-initiated personal bankruptcy cases, see Jason Kilborn & Adrian Walters, *Involuntary Bankruptcy as Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job*, 87 AM. BANKR. L.J. 123 (2013).

181. The new institution of "Financial Ombudsman" fills a small part of this void, though its heritage makes it an unlikely candidate for dispassionate advice to overindebted consumers. In the fall of 2010, the Association of Russian Banks adopted a charter creating a Financial Ombudsman as a mediator of credit disputes with citizens. The most common request from consumers has been about restructuring unsustainable debt, but while the Ombudsman might suggest such a restructuring, his suggestions are just that—recommendations—though the banks have often accepted the Ombudsman's proposals. See Anastasiya Ivelich, *Finansovyi ombudsmen: kto on takoi i chem mozhet byt' polezen zayomshchiku*, KREDITY.RU,

happen: debtors will have to pay a lawyer to help prepare their petitions, or they will file *pro se*. The former route can be expensive. Lawyers and accountants have been helping individual entrepreneurs file bankruptcy petitions for years,<sup>182</sup> and many started advertising their services to all individual debtors soon after the new personal bankruptcy law was passed.<sup>183</sup> A firm in St. Petersburg, for example, lists prices online for individual bankruptcy representation, with a “Bankruptcy lite” package of simple advice on proceeding *pro se* at 10,000 rubles, along with a full-service representation “Bankruptcy turnkey” package “from 15,000 rubles per month.”<sup>184</sup> Even a modest estimate of six months of full-service representation would thus cost three times the gross average monthly wage in mid-2015.<sup>185</sup> The less expensive route—debtors’ going it alone, with

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<http://www.credits.ru/article/finansovyy-ombudsmen-kto-on-takoy-i-chem-mozhet-byt-polezen-zaemshchiku> (last visited Feb. 28, 2016). The creation of this institution seems to have been a clever attempt by banks to divert borrowers away from an expected personal bankruptcy regime—we will now see if debtors develop restructuring plans more frequently in cooperation with the Ombudsman or in the bankruptcy process.

182. Cases involving individual entrepreneurs will now be governed by the new general personal bankruptcy rules. Law 127-FZ, *supra* note 142, art. 214.1.

183. A search of the internet in Russian for “*bankrotstvo fizlits*” produces over one hundred thousand hits, many of which are law firms advertising their services, even before the new law has become effective. For example, on the dividing line between Europe and Asia in Ekaterinburg (formerly Sverdlovsk), a “Center for Assistance in Individual Bankruptcy” began advertising its services on the internet in May 2015. See Mikhail Sachev, *Bankrotstvo Grazhdan*, SACHEV.RU, [http://sachev.ru/bankrotstvo\\_grazhdan.htm](http://sachev.ru/bankrotstvo_grazhdan.htm) (last visited Feb. 28, 2016).

184. *Stoimost’ bankrotstva fizicheskix lits*, BANKROT KONSALT, <http://2lex.ru/bankrotstvo-fizicheskix-lits/stoimost-bankrotstva-fizicheskix-lits/> (last visited Feb. 28, 2016).

185. For information on official and unofficial average monthly wages for 2015, see *Srednie zarplaty po Rossii* [Average Salaries Across Russia], KADROVYE AGENSTVA ROSSII [RECRUITMENT AGENCIES OF RUSSIA] (2015), <https://person-agency.ru/salary.html> (indicating a rough average of 30,000 rubles per month, before deduction of the flat 13 percent income tax, across a number of official and unofficial indicators, though noting that the average wage varies significantly across regions; over 40,000 rubles per month in Moscow, for example, but 31,000 or less in St. Petersburg and Ekaterinburg, and about 25,000 in other notable regions, such as Omsk and Tomsk and Perm). In terms of purchasing power parity, 90,000 rubles was equivalent to about \$4700 USD in 2014, and probably far less today. See *World Development Indicators: Exchange Rates and Prices*, WORLD BANK (2014),

or without 10,000 rubles of advice on which forms to fill—will lead inevitably to errors, delays, and burdens on the commercial court system. The first European personal insolvency system, in Denmark, has struggled with exactly this problem since its inception in the mid-1980s: More than half of all petitions there are rejected, many (if not most) as a result of debtors' errors in preparing petitions and supporting documentation.<sup>186</sup>

Another potential complication is the filing location, though the courts already have a sophisticated solution to that problem. Bankruptcy cases for individuals are within the jurisdiction of the commercial (*arbitrazh*) courts<sup>187</sup> for the place of the

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<http://wdi.worldbank.org/table/4.16> (indicating a PPP of 19.1 rubles per US dollar in 2014).

186. See Kilborn, *supra* note 55, at 169–70.

187. The assignment of personal bankruptcy cases to the commercial courts, as opposed to the courts of general jurisdiction, has been a long-festering point of contention. In response to the Ministry proposal vesting jurisdiction in the commercial courts, the Supreme Court acted on a Presidential initiative to introduce a bill in April 2013 to reassign jurisdiction to the ordinary civil courts. See *Verxovnyi sud nameren zabrat' dela o bankrotstve fizlits u arbitrazha*, ROS. GAZ. (Apr. 2, 2013), <http://www.rg.ru/2013/04/02/vs-anons.html>. The Court based its proposed revision on two principal grounds: access to justice (as the commercial courts are few, concentrated in distant regional centers, whereas the ordinary civil courts are numerous and easily accessible to citizens) and subject matter (unlike commercial bankruptcies, personal bankruptcy cases will raise issues of family, labor, contracts, etc., that would otherwise be governed by general civil law)—and it noted that no additional financing would be required for the general civil courts. *Id.*; Vladislav Kulikov, *Ne Zvenit*, ROS. GAZ. (Apr. 23, 2013), <http://www.rg.ru/2013/04/23/bankrotstvo.html>. Proponents of assigning these cases to the commercial courts argued that the civil courts are notoriously overburdened and delayed, all other bankruptcy cases are administered in the commercial courts, including those involving individual entrepreneurs, so the commercial courts can and did handle personal bankruptcies already, and bankruptcy law is a complex and nuanced area of law that requires specialized knowledge and expertise that the general civil courts lack. See *id.*; Anna Zanina, “*Nikakie voprosy vnutri sudebnoi sistemy ne dolzhny reshatsya bez mneniya vysshego suda*”, KOMMERS. (June 20, 2013), <http://www.kommersant.ru/doc/2215570>. In the end, the Supreme Court reconsidered its position, but by that point, the bill had been revised in committee and passed as Law No. 476-FZ, assigning jurisdiction to the ordinary courts; therefore, the law had to be repealed and reenacted as Law No. 154-FZ to return jurisdiction to the commercial courts, with a three-month delay of the effective date to allow the commercial courts to prepare. See Vladislav Kulikov, *V dolgu ne ostavyat*, ROS. GAZ. (Mar. 4, 2015), <http://www.rg.ru/2015/03/04/bankrotstva.html>; Vasilii Mironov, *Bankrotstvo*

debtor's residence, so petitions and supporting documents must be filed there.<sup>188</sup> The “place” of the debtor's residence, in the case of the sparse commercial courts, however, represents an often very expansive area. Russia occupies more territory than any country in the world, yet it has only eighty-odd commercial courts, one in each “subject” of the federation.<sup>189</sup> These “subjects” are similar in size (and sometimes political power) to U.S. states or European countries, and they are often vastly larger.<sup>190</sup> The cities of Moscow and St. Petersburg are their own relatively small subjects, but so is the Siberian Krasnoyarsk Krai, occupying more than 2.3 million square kilometers<sup>191</sup>—more than five times the size of California—yet like the other subjects, it hosts only one commercial court, in its main city of nearly three million inhabitants, Krasnoyarsk.<sup>192</sup> Luckily, the commercial courts have been at the forefront of engagement with technological advances,<sup>193</sup> and the new law establishes an

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*fizlits otlozhat do oseni*, ROS. GAZ. (June 16, 2015, 8:01 PM), <http://rg.ru/2015/06/16/bankrotstvo-site.html> (citing a statement from Sergei Gavrilov, chair of the State Duma Committee on Property, that the commercial courts are better prepared for bankruptcy cases than courts of general jurisdiction, but even the commercial courts need more time to prepare); Anna Zanina, *Bankrotstva grazhdan razvodilis'*, KOMMERS. (July 7, 2015), <http://kommersant.ru/doc/2762937>. The dispute continues, however, as a bill was introduced less than a month after passage of the revised law to reassign jurisdiction over limited aspects of personal bankruptcy cases to ordinary civil courts. *Id.*

188. Federal'nyi Zakon No. 127-FZ RF o Nestostoyatel'nosti (Bankrotstve) [Federal Law No. 127-FZ of the Russian Federation on Insolvency (Bankruptcy)], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Collection of Legislation of the Russian Federation] 2002, No. 43, Item 4190, art. 33(1).

189. See Butler, *supra* note 160, at 6.68–69.

190. See *id.* at 8.18–23.

191. *Territoriya, chislo rayonov, naselonnykh punktov i sel'skikh administratsiy po subyektam Rossiyskoy Federatsii* [Territory, Number of Districts, Inhabited Localities, and Rural Administration by Federal Subjects of the Russian Federation], in FEDERAL'NAYA SLUZHBA GOSUDARSTVENNOY STATISTIKI [FEDERAL STATE STATISTICS SERVICE], VSEROSSIYSKAYA PEREPIS' NASELENIYA 2002 GODA [ALL-RUSSIA POPULATION CENSUS OF 2002] (2002).

192. For the locations of each of the subjects' commercial courts (and a sense of the vast territory that separates many of these from outlying areas), see the website of the commercial courts, *Arbitrazhnyye sudy subyektov RF*, FEDERAL'NYYE ARBITRAZHNYYE SUDY ROSSIYSKOY FEDERATSII, <http://www.arbitr.ru/as/subj/> (last visited Oct. 25, 2016).

193. See Andrey Soloviev & Yury Filippov, *Course of Justice of Arbitration Courts in the Russian Federation*, 3 L. & MOD. STATES 65, 68 (2013). For free

entitlement for any participant in a bankruptcy case to take advantage of electronic filing rules.<sup>194</sup>

Commercial court procedures are document driven,<sup>195</sup> so along with their bankruptcy petitions, debtors are required to file a substantial sheaf of papers describing and documenting their financial history and current situation.<sup>196</sup> Among the most important are documents establishing that the debtor meets the entry criterion of insolvency (*neplatyozhesposobnost'*, literally, inability to pay).<sup>197</sup> This key term is defined analo-

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access to the commercial courts' impressive technical interface for electronic filing and information, see *My Arbitr*, FEDERAL'NYYE ARBITRAZHNYYE SUDY ROSSIYSKOY FEDERATSII, <https://my.arbitr.ru/> (last visited Feb. 28, 2016).

194. Law 127-FZ, *supra* note 142, arts. 34(3), 35(4). Attending hearings is another matter. While parties cannot attend a hearing remotely from a location other than another commercial court site, see Soloviev & Filippov, *supra* note 193, at 69, they can be represented by counsel and not appear personally, ARBITRAZHNYI PROTSESSUAL'NYI KODEKS ROSSIYSKOY FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 59. The possibility has been discussed for several years of deploying mobile offices of the commercial courts (on buses) with video conferencing equipment. See Olga Buxarova, *Autobus ne pridyt*, ROS. GAZ. (Feb. 4, 2014), <http://www.rg.ru/2014/02/04/sudi.html>; Kulikov, *supra* note 187.

195. See, e.g., Kathryn Hendley, *Are Russian Judges Still Soviet?*, 23 POST-SOVIET AFFAIRS 240, 244, 256 (2007); Kathryn Hendley, *Business Litigation in the Transition: A Portrait of Debt Collection in Russia*, 38 L. & SOC'Y REV. 305, 310 (2004).

196. Law 127-FZ, *supra* note 142, art. 213.4(3).

197. See *id.* arts. 213.4(2), 213.6(2)–(3). There is a parallel, additional, objective entry-criterion that must be shown by creditors filing involuntary petitions; that is, the debtor has been in default on debt exceeding 500,000 rubles for longer than three months. *Id.* art. 213.3(2). The debtor is also *required* to file a bankruptcy petition if satisfying one or more creditor(s) would render the debtor incapable of fulfilling at least 500,000 rubles of monetary obligations to other creditors in full within thirty days of their due dates (failure subjects the debtor to a potential fine of 1000-3000 rubles), *id.* art. 213.4(1); insolvency (*neplatyozhesposobnost'*) must still be demonstrated for either of these petitions to be accepted by the court. Law 127-FZ, art. 213.6(3); KODEKS ROSSIYSKOY FEDERATSII OB ADMINISTRATIVNYX PRAVONARUSHENIYAX [KOAP RF] [Code of Administrative Violations] art. 14.13(5). This minimum-debt-in-default rule was originally to be applied to voluntary debtor petitions, to keep the number of these new cases down, at least initially, but in its final form, the law does not apply the minimum-debt-in-default rule to voluntary petitions by debtors. See Mariya Glushenkova, *Esli by ya byl bankrot*, KOMMERS. (June 15, 2015), <http://kommersant.ru/doc/2734461>; Evgeniya Kriuchkova, *Vyxod est'*, KOMMERS. (Dec. 17, 2014), <http://www.kommersant.ru/doc/2635039>. A minimum-in-default-for-three-months rule is a classic Russian approach to pre-



gously to similar definitions in other European personal bankruptcy laws: “circumstances, obviously indicating that [the debtor] is not in a condition to fulfill monetary obligations [in full] . . . within the established period.”<sup>198</sup> The debtor is aided in this showing by a legal presumption of insolvency if any one of a series of circumstances is demonstrated, such as complete cessation of payment on due debts, default on greater than 10 percent of all monetary debts for longer than one month, or debt exceeding the value of all the debtor’s property.<sup>199</sup> This presumption can be rebutted by evidence that the debtor plans to receive money within “a not extended period” that would allow for full payment of all due debts.<sup>200</sup>

The debtor must also nominate, and deposit part of the fee for, a case trustee, called a “financial administrator.”<sup>201</sup> Insolvency professionals in Russia are governed by private, self-

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venting excessive creditor use of bankruptcy. Such a provision was present in President Yeltsin’s 1992 Edict and the first Russian Federation bankruptcy law of 1993. See Williams & Wade, *supra* note 132, at 520–21, 523–24, as well as the 1998 law (imposing, for the first time, a duty to file on companies who cannot pay all debts without rendering themselves unable to pay others); Cummings, *supra* note 138, at 381, 390–91. For personal bankruptcy cases, the figure grew from 10,000 in the first Ministry proposals, to 50,000 in the bill, revised to 300,000 and then 500,000 in the final law. See *Explanatory Note*, *supra* note 172, at 2. The IMF is not a fan of this approach; it favors the approach taken by Russia for debtor petitions. When Lithuania proposed a bipartite access test, like the Russian one, with a debt figure and an insolvency test, the IMF balked, remarking “it is advisable to have a single and clear insolvency threshold” and suggesting a singular focus on the more meaningful insolvency test of “inability to pay debts as they fall due.” Int’l Monetary Fund, *Republic of Lithuania: Technical Assistance Report on Proposals for Reforming the Insolvency Regime* 4 (IMF Country Report No. 11/320, 2011), <https://www.imf.org/external/pubs/ft/scr/2011/cr11320.pdf>.

198. See Law 127-FZ, *supra* note 142, arts. 213.4(2); *id.* art. 213.6(3). This language is very similar to the definition of “overindebtedness” in other European personal insolvency laws.

199. Law 127-FZ, *supra* note 142, art. 213.6(3).

200. *Id.*

201. *Id.* arts. 2, 213.4(4). The financial administrator has a variety of duties, including analyzing the debtor’s financial situation, investigating for assets and any evidence of bankruptcy fraud, collecting and distributing on creditor claims, conducting meetings of creditors, monitoring the debtor’s compliance with an adopted restructuring plan, and liquidating the debtor’s nonexempt property. *Id.* art. 213.9(8).

regulated organizations (“SROs”).<sup>202</sup> The debtor identifies the SRO from whose membership the financial administrator for the case will be selected, and the court appoints a member, presumably from a list supplied by the various SROs.<sup>203</sup> The debtor must also deposit 10,000 rubles as a one-time fee for remuneration for this private administrator’s work on the case.<sup>204</sup> The debtor’s only other case administration expenses are for a relatively modest one-time filing fee<sup>205</sup> and for publication of around six to ten official notices relating to the course of the proceedings,<sup>206</sup> which lawmakers expressly made less expensive by the creation of an electronic Unitary Federal Register of Bankruptcy Data.<sup>207</sup>

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202. As of mid-July 2015, there were fifty-five active SROs listed in the Unitary Federal Register of Bankruptcy Data, with over ten thousand total members. See *Samoreguliruemye organizatsii arbitrazhnykh upravlyayushchix*, EDINYI FEDERAL’NYI REESTR SVEDENII O BANKROTSTVE, <http://bankrot.fedresurs.ru/SroList.aspx> (last visited Feb. 28, 2016). A central government regulator of sorts existed in one iteration or another from September 1993 to March 2004, most recently called the Federal Service on Financial Rehabilitation and Bankruptcy, but a nationwide push for decentralization and reduction of bureaucratic hurdles devolved regulatory power to these SROs in the early 2000s. See Elena Shmeleva, *Dolzhnik pod kontrolem: Fiskal’naya sluzhba zastavit vernut’ den’gi v kaznu*, ROS. GAZ. (Oct. 23, 2012), <http://www.rg.ru/2012/10/23/dolzhnik.html>; Alexander Yerofeyev, *Development of the Russian Bankruptcy Regime: Law and Practice*, 10 INT’L INSOLVENCY REV. 115, 116, 136–37 (2001); Artur Trapitsyn et. al, *The Russian Approach to Modern Insolvency Management*, EUROFENIX, Spring 2008, at 9, [www.hww.eu/sites/default/files/Eurofenix\\_Spring\\_08\\_Russia\\_02.pdf](http://www.hww.eu/sites/default/files/Eurofenix_Spring_08_Russia_02.pdf); Brooks, *supra* note 143, at 22.

203. Law 127-FZ, *supra* note 142, arts. 42(9), 45, 213.4(4), 213.6(4).

204. See *id.* art. 213.4(4). The debtor can request that this deposit be put off until the date of the first hearing, but there is no *in forma pauperis* method of seeking relief if the deposit cannot be made. *Id.* At the end of the case, the administrator also stands to earn 2 percent of either (1) payments made pursuant to a restructuring plan or (2) assets distributed to creditors in a bankruptcy liquidation. *Id.* art. 20.6(3), (17), 213.9(3)–(4).

205. The filing fee (*gosposhlina*) for personal bankruptcy seems to be 6000 rubles, though these fees change over time and can be checked by using the online fee calculator for any given commercial court. The one for the Moscow court can be found, for example, at *Kalkulyator gosposhliny*, FEDERAL’NYYE ARBITRAZHNYYE SUDY ROSSIYSKOY FEDERATSII, [http://msk.arbitr.ru/process/duty/calc\\_](http://msk.arbitr.ru/process/duty/calc_) (last visited Feb. 28, 2016).

206. See Law 127-FZ, *supra* note 142, art. 213.7.

207. See EDINYI FEDERAL’NYI REESTR SVEDENII O BANKROTSTVE, <http://bankrot.fedresurs.ru/> (last visited Feb. 28, 2016); *MER Interview*, *supra* note 149 (noting goals of the Register of cost savings for debtors and bank-

The court must evaluate the debtor's petition at a hearing within three months of the petition's filing.<sup>208</sup> Not only are the commercial courts driven by documents, they are driven by the calendar, as well. As members of a civil service, commercial court judges have an impressive history of adherence to strict deadlines for case administration, as evaluations for salary increases and promotions are based in large part on observance of these work-rhythm scheduling rules (as well as rates of reversal on appeal).<sup>209</sup> If at the hearing the court finds that the documents establish that the debtor meets the entry requirement(s), the court enters an order opening the case,<sup>210</sup> a stay of any enforcement action by creditors (including secured creditors) is imposed,<sup>211</sup> and the case proceeds to the first of two phases: a period for creditors' consideration of a restructuring plan, and/or a declaration of the debtor's bankruptcy and a liquidation and distribution procedure.

#### *b. Restructuring Plan Option*

Within two months of publication of the order opening the case, creditors must submit their claims to the financial administrator,<sup>212</sup> and the debtor has an opportunity to present a restructuring plan to creditors up to ten days before the expiration of this two-month period.<sup>213</sup> To be entitled to submit a re-

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ruptcy estates, as well as transparency and accessibility of information). Posting on the Unitary Register costs only 300–350 rubles per listing, half the cost of listings in commercial bankruptcy cases. See *Otveti na chasto zadavaemye voprosy*, EDINYI FEDERAL'NYI REESTR SVEDENII O BANKROTSTVE, [http://bankrot.fedresurs.ru/Help/FAQ\\_EFRSB.pdf](http://bankrot.fedresurs.ru/Help/FAQ_EFRSB.pdf) (last visited Feb. 28, 2016) (FAQ for the Register, including no. 5, the cost of commercial listings); Law 127-FZ, *supra* note 142, art. 213.7(4) (imposing the half-price rule for bankruptcy cases of individuals); Constantine Milantiev, *Zakon o bankrotstve fizicheskix lits*, BANKROT KONSALT, <http://2lex.ru/bankrotstvo-fizicheskikh-lits/zakon-o-bankrotstve-fizicheskikh-litz/> (last visited Feb. 28, 2016).

208. Law 127-FZ, *supra* note 142, art. 213.6(5).

209. See Hendley, *supra* note 195, at 244, 259–60.

210. Law 127-FZ, *supra* note 142, arts. 213.6.

211. *Id.* arts. 18.1, 213.10(1), 213.11. Unmatured claims are accelerated, and accruing interest, fines, and penalties stop, as well. *Id.* art. 213.11(2).

212. *Id.* art. 213.8(2).

213. *Id.* art. 213.12(1). At any time, the debtor and creditors can also conclude a settlement agreement (*mirovoe soglashenie*), which like a restructuring agreement is adopted by majority vote of the meeting of creditors, but unlike a restructuring agreement, has no prescribed maximum time limit. *Id.* arts. 15, 150, 151, 155–59, 213.31.

structuring plan, the debtor must have a source of income and cannot have been convicted of certain economic crimes.<sup>214</sup> Those who do not meet these requirements can request that the case proceed immediately to the liquidation and distribution processes.<sup>215</sup> In a provision unique to the Russian law (added in the legislative revision process), creditors are also allowed to propose restructuring plans,<sup>216</sup> though they must indicate whether the debtor has agreed or objected to their plan.<sup>217</sup>

The contents of the plan (e.g., time extensions, interest reductions, principal forgiveness) are limited only by creditors' willingness to accept the terms,<sup>218</sup> though the plan may not extend beyond three years.<sup>219</sup> For most debtors with substantial debt burdens, three years is insufficient time to allow for full payment; therefore, restructuring plans will have to contain some measure of debt forgiveness. Creditors vote on a restructuring plan at a meeting of creditors convened by the financial administrator within four months after publication of the case opening order (sixty additional days beyond the claims submission deadline).<sup>220</sup> A plan is accepted if creditors holding a majority of claims registered with the financial administrator vote in favor of the plan.<sup>221</sup> Secured creditors must agree to plans proposing that the debtor keep their collateral; otherwise, the

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214. *Id.* art. 213.13. These unique "economic conviction" rules were supposedly designed to reflect international norms of allowing only good faith debtors access to a restructuring process, although I do not recall ever having seen such provisions in other laws. *Explanatory Note, supra* note 172, at 3.

215. Law 127-FZ, *supra* note 142, art. 213.6(8).

216. *Id.*

217. *Id.* art. 213.15(1).

218. Certain claims are excluded from modification in a plan, such as personal injury, alimony, wages, and intellectual property claims. *Id.* art. 213.14(4). All but the intellectual property claims must be paid in full before the plan can be confirmed. *Id.* arts. 213.17(1), 213.27.

219. *Id.* art. 213.14(2). This is reduction from five years in the original bill. *Explanatory Note, supra* note 172, at 4. Also, an accepted plan must include interest on claims at the Central Bank's "refinancing rate." Law 127-FZ, *supra* note 142, art. 213.19(2).

220. Law 127-FZ, *supra* note 142, art. 213.12(5). Creditors can participate remotely, including by electronic means, if the financial administrator allows it. *Id.* art. 213.8(1)–(11).

221. *Id.* arts. 12(3), 15, 213.16. Those voting against the plan must receive treatment no worse than those voting in favor, *id.* art. 213.14(3), and any creditor receiving a disproportionately smaller percentage payout must specifically vote in favor of the plan, *id.* art. 213.14(5).

collateral must be sold.<sup>222</sup> An accepted plan must still be confirmed by the commercial court for compliance with the law.<sup>223</sup>

If the requisite majority of creditors does not support a plan, the court can impose the plan on creditors nonetheless under limited circumstances (in common parlance, a “cram-down”). Such a plan must propose full payment of secured creditors and at least 50 percent payment to unsecured creditors, and this payment must be “substantially more” than creditors would receive if the proceeds of liquidation of the debtor’s assets and six months of nonexempt income were distributed to creditors.<sup>224</sup>

An accepted plan can be modified (for better or worse) upon the request of either the debtor or the meeting of creditors, and the debtor has a duty to notify creditors in writing of “material modifications” in their financial situation.<sup>225</sup> If the debtor fails to fulfill the terms of a confirmed restructuring plan, the court can set aside the plan and commence bankruptcy proceedings only if the meeting of creditors (or an individual creditor) requests that the debtor be declared bankrupt and liquidation proceedings be commenced.<sup>226</sup>

### *c. Bankruptcy and Asset Liquidation/Collection/Distribution*

If no plan is timely submitted by either the debtor or a creditor,<sup>227</sup> or if the meeting of creditors rejects a proposed plan, the court will declare the debtor bankrupt and order the com-

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222. *Id.* arts. 18.1(5), 213.10(3). Oddly, another provision allows a secured creditor who voted against the plan to request permission to seize collateral, but not if the debtor shows that foreclosure would interfere with fulfillment of the plan. *Id.* art. 213.10(2). These provisions were added in the legislative revision process and appear to be inconsistent: either secured creditors must agree to a plan in which the debtor retains collateral, or they are allowed to seek relief from such a plan they opposed, but both cannot be true.

223. *Id.* arts. 213.17–18.

224. *Id.* art. 213.17(4). The court can also grant a creditor’s request to return the parties to the plan-bargaining table for up to another two months, though in that case, the maximum plan length cannot exceed two years. *Id.* arts. 213.14(2), 213.17(2).

225. *Id.* arts. 213.19(1), 213.20–21.

226. *Id.* arts. 213.22–23.

227. In such case, the financial administrator curiously still has go through the formalism of presenting to the meeting of creditors a proposal to request that the debtor be declared bankrupt. *Id.* art. 213.12(4), (6).

mencement of liquidation proceedings.<sup>228</sup> Liquidation proceedings extend over a six-month period, during which all of the debtor's nonexempt assets, including income received during that period, are collected and liquidated by the financial administrator.<sup>229</sup> The six-month period can be extended upon request of a participant in the case, but the law provides no specific basis upon which to grant such a request.<sup>230</sup> It is not immediately clear from the law that income is included in this expropriation process, but it follows from provisions requiring the debtor to turn over all bank cards<sup>231</sup> (since that is how many if not most Russians receive official salary and benefit payments<sup>232</sup>) and forbidding any third party from transferring money or other property to the debtor; rather, directing that such transfers be made to the financial administrator.<sup>233</sup>

Several enumerated items of property are excluded from the bankruptcy estate and reserved for the debtor. Standard property exemptions law applies in bankruptcy proceedings,<sup>234</sup> and these protections are broadly in line with European standards, though Russia has a notably generous (and controversial) exemption for housing.<sup>235</sup> Home ownership is quite widespread in Russia thanks to the housing privatization process.<sup>236</sup> Homeowners' property rights are generously protected by an unlimited exemption for "residential premises" (and the land underlying it) if it is the only one owned by the debtor that is suitable

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228. *Id.* art. 213.24(1)–(2).

229. *Id.* arts. 213.24(2), 213.25–26. The court may prohibit the debtor from leaving the country during this liquidation period. *Id.* art. 213.24(3).

230. *Id.* art. 213.24(2).

231. *Id.* art. 213.25(9).

232. *See supra* notes 17–20 and accompanying text.

233. Law 127-FZ, *supra* note 142, art. 213.25(7).

234. *Id.* art. 213.25(3).

235. GRAZHDANSKII PROTSESUAL'NYI KODEKS ROSSIISKOI FEDERATSII [Civil Procedural Code] [GPK RF] art. 446; Federal'nyi zakon ob ispolnetel'nom proizvodstve ot 02.10.2007 N. 229-FZ [Federal Law on Execution Process of Oct. 2, 2007, No. 229-FZ] arts. 99, 101, <http://www.consultant.ru/popular/ispolproisv/>.

236. *See MASHKINA ET AL.*, *supra* note 29, at 2; EUROPEAN MORTG. FED., HYPOSTAT 2013: A REVIEW OF EUROPE'S MORTGAGE AND HOUSING MARKETS 101 tbl. 18 (2013), [http://www.hypo.org/PortalDev/Objects/6/Files/HYPOSTAT\\_2013.pdf](http://www.hypo.org/PortalDev/Objects/6/Files/HYPOSTAT_2013.pdf) (noting an 84 percent owner-occupied rate in 2010).

for permanent habitation.<sup>237</sup> The Constitutional Court has repeatedly held that this exemption, unlimited in size or value, is unconstitutional, as it is improperly broad, imbalanced in favor of debtors, and a violation of creditors' rights,<sup>238</sup> but the legislature has consistently ignored these challenges.

Russian law also protects the debtor's personal property, such as ordinary household items and clothing, tools and items necessary for the debtor's profession or trade (up to a value ceiling of one hundred times the minimum monthly wage), noncommercial farm animals and feed, fuel and food, and necessary "means of transportation."<sup>239</sup> The most important personal property exemption for most debtors is not for hard assets, but for ongoing income (salary and wages), which is protected up to a subsistence minimum level for the debtor and each dependent, revised quarterly (in the first quarter of 2015, about 10,000 rubles per month per adult).<sup>240</sup>

If the value of the debtor's assets and/or income exceeds these protected thresholds, their value is distributed to creditors in a prescribed order of priority. Expenses of case administration and debts arising during the administration of the case must be paid first, most notably the financial administrator's 2 percent fee,<sup>241</sup> as well as (in order of priority) family support debts, debts for wages and vacation pay for laborers working for the debtor (though such debts are unlikely to occur in this context with any frequency), and debts for (communal) housing and

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237. GRAZHDANSKII PROTSESUAL'NYI KODEKS ROSSIISKOI FEDERATSII [Civil Procedural Code] [GPK RF] art. 446.

238. See *Postanovleniye Konstitutsionnogo Suda RF ot 14 maya 2012 g. N 11-P*, ROS.GAZ. (May 30, 2012), <http://www.rg.ru/2012/05/30/sud-dok.html>; *Postanovleniye Konstitutsionnogo Suda Rossiyskoy Federatsii ot 12 iyulya 2007 g. N 10-P*, ROS. GAZ. (July 21, 2007), <http://www.rg.ru/2007/07/21/bezmenov-kalabun.html>. One wonders whether the Constitutional Court will find the discharge provisions of the new personal bankruptcy law unconstitutional in light of the tenor of these rulings.

239. GRAZHDANSKII PROTSESUAL'NYI KODEKS ROSSIISKOI FEDERATSII [Civil Procedural Code] [GPK RF], art. 446.

240. *Id.* The subsistence minimum income is announced quarterly by Government Resolution (*Postanovlenie Pravitel'stva*) and is based on changes in the consumer price index, and the specific amount varies depending on the nature of the individual (worker or pensioner, child or adult). See *Velichina Prozhitochnogo Minimuma v Rossiiskoi Federatsii*, KONSULTANT PLYUS, <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=33936>.

241. Law 127-FZ RF, *supra* note 142, arts. 20.6(3), (17), 213.9(3)–(4).

services.<sup>242</sup> As for precommencement debts, personal injury and family support debts have top priority, followed by labor claims (again, likely uncommon).<sup>243</sup> Payment to secured creditors from the proceeds of liquidation of collateral is subject to a complicated carve out, which reserves 10 percent of those proceeds for payment of priority and general unsecured creditors.<sup>244</sup> The statute reserves this amount even if the secured creditor's claims are never satisfied in full (as well as up 10 percent for unsatisfied case administration expenses).<sup>245</sup> All other creditors are paid ratably from any remaining funds.

*d. Discharge and Debtor Restrictions*

Claims that are not fully satisfied by the liquidation proceeds “are considered paid.”<sup>246</sup> That is, the debtor “is freed from further fulfillment of creditor demands,” including those of unknown creditors and creditors not participating in the proceedings.<sup>247</sup> The list of debts that are excepted from this discharge is quite limited, encompassing only the priority claims discussed immediately above, along with claims for the term-of-art concept “moral harm,” for reckless or intentional property

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242. *Id.* arts. 5, 213.27(1)–(2).

243. *Id.* art. 213.27(3).

244. *Id.* art. 213.27(5).

245. *Id.*

246. *Id.* art. 213.27(6).

247. *Id.* art. 213.28(3). The debtor can be denied a discharge for defined and established administrative infractions (e.g., concealing property, impeding the administrator) during the bankruptcy case or for fraudulent or intentional bankruptcy, both carefully defined terms of art. *Id.* art. 213.28(4); KODEKS ROSSIJSKOI FEDERATSII OB ADMINISTRATIVNYX PRAVONARUSHENIYAX [KOAP RF] [Code of Administrative Violations] art. 14.12–.13. A new provision added in the legislative revision process also denies a discharge to debtors who “maliciously avoided paying credit obligations” or taxes, obtained credit through fraud, or hid or intentionally destroyed property. Law 127-FZ, *supra* note 142, art. 213.28(4). The first, quoted portion is potentially troubling, but a similar provision has long been present in the Criminal Code, and few if any prosecutions have occurred under that provision, so perhaps this is simply a matter of parallelism that will have no practical effect. See Igor Gerasimov, “*Nikakix mer vozdeistviya, krome lasckovyx ugovorov*”, KOMMERS. (June 3, 2015), <http://www.kommersant.ru/doc/2738706> (quoting Anna Konyaeva stating, “Malicious debtors, intentionally evading satisfaction of debts, are not subjected to criminal liability, though such a statute exists—177 [Criminal Code RF] ‘malicious avoidance of satisfaction of indebtedness to creditors.’”).



damage, and subsidiary liability of controlling persons for causing the bankruptcy of a company.<sup>248</sup>

Along with the benefit of a discharge, however, come a few restrictions designed "for the protection of the stability of the banking system and economic activity generally."<sup>249</sup> First, for the five years following the conclusion of either procedure, the debtor must disclose a restructuring plan or bankruptcy whenever seeking credit.<sup>250</sup> Second, during that same five years, the debtor cannot initiate another bankruptcy case.<sup>251</sup> Finally, for the three years following the conclusion of a bankruptcy case, the debtor is prohibited from acting in a directorial capacity in any company,<sup>252</sup> and an individual entrepreneur loses his or her entrepreneurial registration and cannot engage in entrepreneurial activity (or act in a directorial capacity in any company) for five years following the conclusion of bankruptcy proceedings.<sup>253</sup>

## 2. Evaluation: An Elegant System with a Few Quirks and Challenges

So how does the new Russian personal bankruptcy system stand up to the international best practices discussed above?<sup>254</sup> Relatively well, though of course not without a few potential points of friction. The results of this new system will likely not be precisely what many lawmakers either expected or desired (especially in terms of restructuring agreements), but if a few key stumbling blocks are overcome, this will be a well-structured process largely worth emulating. In particular, administrative capacity problems threaten to weigh heavily on this new system, though the commercial courts seem to be moving in the right direction to streamline their operations and overcome these concerns.

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248. Law 127-FZ, *supra* note 142, art. 213.28(5)–(6).

249. *Explanatory Note*, *supra* note 172, at 4.

250. Law 127-FZ, *supra* note 142, arts. 213.19(3), 213.30(1).

251. *Id.* art. 213.30(2).

252. *Id.* art. 213.30(3).

253. *Id.* art. 216.

254. *See supra* Part II.

*a. Discharge With Few Exceptions*

On the most important characteristic, discharge, the new Russian law clearly establishes its “two steps forward, one step back” approach. The law takes two steps forward by finally extending a discharge of unsustainable debt for nonentrepreneur individuals, subject to only a very few common and narrow exceptions.<sup>255</sup> The post-bankruptcy restrictions, however, represent a significant step back.

Post-bankruptcy restrictions are disfavored in modern policy, especially when applied without regard to the debtor’s honesty or lack thereof.<sup>256</sup> The post-bankruptcy obligation to disclose a previous bankruptcy when obtaining credit, while little more than an incident of an underdeveloped credit-reporting system, is symbolic of this disfavored historical perspective. More counterproductive is the five-year restriction on entrepreneurial activity. It will either dissuade active debtors from seeking debt relief who need it, or prevent the full enjoyment of the “fresh start” for both entrepreneurs and the state, both of whom stand to gain from more, not less, entrepreneurial risk-taking. The blanket, five-year restriction on entrepreneurialism runs directly counter to the general European “second chance” policy and the EU Commission’s recommendations on limiting such disabilities to fraudulent or dishonest debtors.<sup>257</sup>

*b. Open and Low-Cost Access*

On the second group of factors, the Russian law is also fairly consistent with European standards and strikes a balance between offering relief and averting abuse. The two main access limitations are cost and the “insolvency” criterion, both of which will bar access for some “honest but unfortunate” debtors, but hopefully to a fairly limited degree. As for cost, legislators carefully limited the official costs to debtors by instituting an online electronic register for filings and announcements and restricting the financial administrator’s fee to a one-time payment of 10,000 rubles.<sup>258</sup> Amounting to no more than about

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255. See *supra* notes 245–52 and accompanying text.

256. See LAW REFORM COMM’N, PERSONAL DEBT MANAGEMENT AND DEBT ENFORCEMENT ¶¶ 3.95–.110 (2010), [http://www.lawreform.ie/\\_fileupload/Reports/r100Debt.pdf](http://www.lawreform.ie/_fileupload/Reports/r100Debt.pdf).

257. *Id.*

258. See *supra* note 204–05 and accompanying text.

two-thirds of the national average monthly salary, or \$1000 USD in purchasing-power-parity terms,<sup>259</sup> the total fees for any given personal bankruptcy case seem fairly modest, though they will deter some lower-income debtors. A greater deterrent will likely be the cost for an attorney to assist the debtor in preparing the petition and schedules, in addition to a restructuring plan if that route is elected. Doubling or tripling the official cost burden,<sup>260</sup> lawyer fees could render many debtors “too poor to be bankrupt,” but this is a conundrum that debtors in other systems have overcome successfully (such as by diverting money to lawyers and bankruptcy fees that would otherwise be given to creditors, since unpaid balances will be discharge in a successful bankruptcy proceeding).<sup>261</sup> Overall, the cost barrier to access in the Russian system is not insubstantial, but neither is it shockingly overwhelming.

The “insolvency” entry criterion is presented in much the same way as in other European personal insolvency laws, so the law “on the books” is heartening. The Russian law admirably eschews the pre-Revolutionary approach<sup>262</sup> of requiring a probing examination of the debtor’s morality or deservingness or the reasons for the debtor’s predicament. The insolvency criterion is drafted in a nonjudgmental way that requires some subjective evaluation but is still cabined by objective indicators. A final evaluation will have to await a demonstration of the law “in action,” however, as the courts put a Russian spin on what it means for debtors to demonstrate circumstances “obviously” showing that they are “not in a condition” to pay their debts, and that this condition will not be relieved in a “not ex-

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259. See *supra* note 185 for a description of average salary and PPP conversion rates applied here.

260. Lawyer fees in Russia seem to be in line with fees for personal bankruptcy cases in the United States, and like their U.S. counterparts, many Russian debtors will likely attempt to avoid attorney’s fees by electing to pursue their cases *pro se*, despite the substantially increased likelihood of dismissal for various errors and failures. See generally LOIS R. LUPICA, THE CONSUMER BANKRUPTCY FEE STUDY: FINAL REPORT (2011), <http://www.abi.org/member-resources/law-review/the-consumer-bankruptcy-fee-study-final-report>.

261. See, e.g., Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GA. LAW J. 289, 318–24 (2010) (describing several strategies used by debtors to accumulate attorneys’ and filing fees in the United States).

262. See *supra* notes 117–22 and accompanying text.

tended period of time.”<sup>263</sup> The objective presumptions written into the law will help ease this analysis, but it will be up to the courts to apply the law in a way that either broadens or narrows the entry portal to this new system. Though the law constrains judicial discretion in large part, the operative language still leaves room for significant divergences in approach or a restrictive and unproductive interpretation of legislative intent.

Just as important as the presence of good approaches is the notable absence of a particularly bad one: The statute does not require Russian debtors to negotiate relief from their creditors in an informal process as a prerequisite to entry into the formal relief system. This largely pointless exercise in futility has caused serious problems in many other European personal insolvency regimes,<sup>264</sup> and it is laudable that Russian lawmakers did not impose this common requirement on debtors. The absence of an established network of consumer debt counselors may have forced lawmakers’ hands here,<sup>265</sup> but for whatever reason, allowing insolvent debtors direct access to a structured, formal process is an evolving best practice. That is not to say that the Russian law leaves no room for negotiation with creditors; it does this, however, in a controlled environment where the financial administrator and the court can potentially exert some positive influence, in the first of the two-stage creditor satisfaction process.

### *c. Creditor Satisfaction*

On the third characteristic of personal insolvency laws, the result in most cases under the new Russian law will likely fall very much in line with European standards. Uniform, and therefore more equitable, treatment of all debtors is embedded in the core operating procedure, avoiding problems of discretionary inequalities and wasted time crafting zero-payment plans. The Russian procedure is more streamlined and efficient in several key ways, perhaps marking a movement toward a

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263. See *supra* notes 198–200 and accompanying text.

264. See KILBORN, *supra* note 57, at 25–28.

265. A similar reason may explain the absence of a required pre-bankruptcy negotiation in Denmark, the United Kingdom, and much of Eastern and Southern Europe. See Kilborn, *supra* note 55, at 168–69; see KILBORN, *supra* note 57, at 25.

more rational approach to personal bankruptcy in Europe. That being said, this factor contains a few spots of potentially serious trouble, depending upon how the process plays out on the ground, especially with respect to home mortgages.

i. Restructuring Plans: A Dream Not Come True

Debtors have their chance to negotiate a restructuring with creditors at the very beginning of the formal process. The pan-European preference for negotiated solutions finds its expression here, buttressed by the court's ability to impose a best-efforts plan on irrationally recalcitrant creditors.<sup>266</sup> After a neutral and disinterested court has examined the debtor's finances and established "insolvency," creditors ought to be primed to consider a compromise arrangement, especially if a discharge of their claims lies on the other side of their negotiating line in the sand. In theory, this first stage of facilitating maximal creditor satisfaction reflects best practices.

In reality, despite lawmakers' emphasis that this entire process serve primarily as a platform for facilitating restructuring agreements, successful restructuring plans will most likely be a fleeting fantasy. Decades of experience in Europe have shown that most individual debtors lack the capacity to offer their creditors anything close to what is necessary to strike an acceptable restructuring deal, especially when the timetable is limited to three years.<sup>267</sup> It is not surprising that restructuring plans are commonplace in business reorganization proceedings, while they are the rare exception in personal bankruptcy cases. Artificial business entities can credibly promise much better returns (often involving very large values) if the business is allowed to continue, and these enticements are often supported by professional advisors and are burdened by very little moral baggage in the dog-eat-dog world of business.<sup>268</sup>

In contrast, individual debtors generally have little to offer on low-value debts with their limited future earning capacity. And

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266. See *supra* notes 219–24 and accompanying text.

267. See, e.g., Jason J. Kilborn, *The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law from Unexpected Parallels in the Netherlands*, 39 VAND. J. TRANSNAT'L L. 77, 90–91 (2006) (reporting on a study of credit counselling, suggesting a threshold for successful restructuring plans of at least 40–50 percent payment on creditor claims); KILBORN, *supra* note 57, at 46–47; World Bank, *supra* note 60, ¶¶ 298, 300, 313.

268. See, e.g., World Bank, *supra* note 60, ¶¶ 50, 210–11.

in the personal context, value-maximizing economic rationalization is often pushed aside as creditors take an emotionally driven, judgmental stance toward debtors' failure to "live up to their promises."<sup>269</sup> Russian experts have long predicted that creditors will be generally unwilling to agree to restructuring plans for individual debtors.<sup>270</sup> If legislators hoped that individual debtors would be able to overcome these obstacles and reach compromise agreements with creditors, those hopes are destined to be dashed.

It is particularly odd that the Russian law invites creditors not only to evaluate restructuring plans, but also to submit them.<sup>271</sup> Given the low values (and, for some institutional creditors, high volume) of these individual cases, creditors have very little incentive in most cases to spend time considering a plan, much less crafting one that the debtor might or might not agree to and/or fulfill—the debtor already defaulted, after all—and other creditors will have to agree to the plan and accept its benefits as free-riders. This is just not a cost-effective approach for creditors. In international practice today, it is an extreme rarity that creditors participate at all in the formulation of restructuring plans.<sup>272</sup> Creditors have every reason to prefer a quick bankruptcy liquidation and distribution, write-off of the unpaid debt, and clean balance sheet, not throwing good money (and time) after bad.

It is somewhat ironic that the Ministry of Economic Development supported its original proposal by naming Sweden among one of the three explicitly identified countries with "sufficiently successful mechanisms" of personal debt relief.<sup>273</sup> Sweden learned the bitter lesson of deferring to creditor voting on personal debt restructuring plans. Even in cases where a plan had been proposed by the government debt collection agency, applying standard criteria, many creditors refused in principal to accept such compromises.<sup>274</sup> The Swedish re-

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269. *Id.* ¶ 66.

270. *See, e.g., "Fiziki" smogut bankrotit'sya, supra* note 155.

271. *See supra* note 216 and accompanying text.

272. *See, e.g., World Bank, supra* note 60, ¶¶ 209, 212.

273. *See supra* note 149 and accompanying text.

274. *See* Jason J. Kilborn, *Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 AM. BANKR. L.J. 435, 460 (2007) [hereinafter Kilborn, *Out with the New*]. Irish lawmakers have confronted

sponse to this problem was decisive: In 2007, after thirteen years of experience under one of the earliest European personal insolvency laws, Swedish lawmakers scrapped all efforts to engage creditors in restructuring plan negotiations, in favor of simply imposing statutory best-efforts plans on them.<sup>275</sup>

Yet Russian legislators have just oriented their new system down this same path to demonstrated failure. To its credit, the Russian procedure contains a “cram-down” procedure to overcome irrational creditor resistance,<sup>276</sup> but its application will be extremely limited, at best. Few if any debtors who qualify as “insolvent” will be able to pay secured debt in full and unsecured creditors the statutory minimum 50 percent owed to them (with interest) within three years, while also supporting their families.

Eventually, personal bankruptcy cases might well sort themselves into “mildly insolvent” and “hopelessly insolvent,” with the former group proposing and confirming restructuring plans. The regimes in France and the Netherlands offer examples of such a nicely divided model, but they both have something crucial that the Russian regime lacks: a trusted and influential coordinating institution than can aggressively negotiate with creditors.<sup>277</sup> In France, the central bank has been instrumental in goading creditors into agreeing to workout plans, and it runs an elaborate network of commissions throughout the country to process individual cases.<sup>278</sup> In the Netherlands, a respectable rate of plan confirmation has been achieved only thanks to the concerted efforts of a carefully coordinated credit-counseling industry.<sup>279</sup> Russia lacks either of these institutions

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similar attitudes among prominent banks with respect to the reformed Irish personal insolvency scheme. See Jason Kilborn, *Banks Fighting New Irish Insolvency Service Before It Starts*, CREDIT SLIPS BLOG (Sept. 4, 2013, 9:56 AM), <http://www.creditslips.org/creditslips/2013/09/banks-fighting-new-irish-insolvency-service-before-it-starts.html>.

275. See Kilborn, *Out with the New*, *supra* note 274, at 457–61.

276. See *supra* note 224 and accompanying text.

277. See, e.g., World Bank, *supra* note 60, ¶ 136.

278. See Jason J. Kilborn, *La Responsabilisation de l'Economie: What the United States Can Learn from the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619, 635–40, 645–46 (2005).

279. See Kilborn, *supra* note 267, at 87–88; Jason J. Kilborn, *Still Chasing Chimeras but Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform*, 25 LOY. CONSUMER L. REV. 1, 16–17 (2012).

or any other indicator of likely personal debt restructuring success.

Indeed, Russia's own experience over more than a decade with settlement plans in the context of individual entrepreneurs' bankruptcies provides ample evidence of the futility of hoping for negotiated solutions. At any point in the bankruptcy process, proceedings can be terminated by the conclusion of a settlement agreement with creditors.<sup>280</sup> For individual entrepreneurs, this option has been for many years the functional equivalent of the restructuring plan envisioned for individual debtors in stage one of the new personal bankruptcy law.<sup>281</sup> For individual entrepreneurs, who likely have greater resources at their disposal than the average nonmerchant individual, how often have debtors been able to work something out with their creditors and put an end to their bankruptcy cases? According to court statistics, not frequently: In 2014, the commercial courts closed 26,264 bankruptcy cases.<sup>282</sup> Of these, 598—2 percent—were closed upon conclusion of a settlement agreement (*mirovoe soglashenie*).<sup>283</sup> Results were similar in each of the preceding four years, with settlements actually rising from just 0.8 percent of all closed cases in 2010 to a high of 2.5 percent in 2013.<sup>284</sup> These statistics aggregate business and individual cases, so it is not possible to know what percentage of these few settlements arose in cases involving individual entrepreneurs rather than companies—it could be that settlements are *more* common in cases involving individuals, though the opposite seems much more likely.

Two further pieces of evidence suggest that agreed workouts will be rare in personal bankruptcy cases. First, in the devel-

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280. See *supra* note 213.

281. See Kirill Gorbatov, *Dolzhen ne budesh'*, ROSSIISKAYA GAZETA (June 9, 2015, 12:40 AM), <http://www.rg.ru/2015/06/09/bankroty.html> (making this comparison).

282. *Otchyot o rabote arbitrazhnykh sudov sub"ektov Rossiiskoi Federatsii po rasmotreniyu del o bankrotstve* 2014 tbl. 1 (2015), SUDEBNYY DEPARTAMENT [http://www.cdep.ru/userimages/sudebnaya\\_statistika/2014/Otchet\\_o\\_rabote\\_arbitrazhnykh\\_sudov\\_subektov\\_RF\\_po\\_delam\\_o\\_bankrotstve.xls](http://www.cdep.ru/userimages/sudebnaya_statistika/2014/Otchet_o_rabote_arbitrazhnykh_sudov_subektov_RF_po_delam_o_bankrotstve.xls).

283. *Id.*

284. *Svedeniya o rassmotrenii arbitrazhnykh sudami Rossiiskoi Federatsii del o nesostoyatel'nosti (bankrotstve) v 2010-2013 gg.*, FEDERAL'NYYE ARBITRAZHNYYE SUDY ROSSIYSKOY FEDERATSII (2013), [http://www.arbitr.ru/\\_upimg/A0397A1AFD76C6B4E3082E213B98BB5D\\_11.pdf](http://www.arbitr.ru/_upimg/A0397A1AFD76C6B4E3082E213B98BB5D_11.pdf).



opment of a bill to formalize the new unofficial office of Financial Ombudsman,<sup>285</sup> banks opposed a provision requiring them to comply with the Ombudsman's proposals for restructuring unsustainable personal debts.<sup>286</sup> The Financial Ombudsman position was designed and implemented by banks to be a neutral mediator between them and individual debtors.<sup>287</sup> If the banks are unwilling to accept restructuring proposals from within their own tailor-made structure, the chances seem quite slim that they will accept proposals from unsupported individual debtors. Second, based on recent experience with represented debtors, one bankruptcy advisor is already comforting potential clients by suggesting that most debtors will have insufficient incentive or ability to seek a restructuring in personal bankruptcy cases, mostly due to lack of sufficient income.<sup>288</sup>

So much for stage one. Given the incentives and practical realities in most personal bankruptcy cases, neither the debtor nor any creditor will submit a restructuring plan, and after a statutory two-month delay, the lion's share of cases will proceed immediately to stage two, liquidation bankruptcy.

## ii. Bankruptcy: The Hidden Payment Plan . . . and Hidden Income

Though the explicit focus of the bankruptcy stage is on collection and liquidation of the debtor's hard assets, this stage actually resembles the standard European "earned start" with a payment plan, as well. Because the process lasts six months by statute, and all of the debtor's property acquired during this period becomes part of the estate, turnover of a limited portion of future income is clearly part of the bargain with creditors in exchange for the discharge. Legal protections for a minimum modicum of property and income ensure debtors' dignified existence during and after bankruptcy, and again to the credit of Russian lawmakers, these protections are largely equal and

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285. See *supra* note 181.

286. Irina Badmaeva, *Osen'yu v Rossii poyavitsya finansovyi*, MK (July 9, 2015, 7:06 PM), <http://www.mk.ru/economics/2015/07/09/osenyu-v-rossii-poyavitsya-finansovyy-ombudsmen.html>.

287. See *supra* note 181.

288. See *Protsedura bankrotstva fizicheskogo litsa*, BANKROT KONSALT, <http://2lex.ru/bankrotstvo-fizicheskikh-lits/procedura-bankrotstva-fizicheskogo-litsa> (last visited Mar. 30, 2016) (reporting that 99 percent of clients likely will not file a restructuring plan due to low or no income).

predictable across the country. Other European regimes have struggled with assigning discretion to a court or other administrator to decide how much of the debtor's future income to reserve for family support.<sup>289</sup> By relying on the minimum income standard, which is revised quarterly, Russian legislators have all but excluded discretion and unequal treatment from this aspect of the system.

Whether 10,000 rubles per month is an appropriate standard for dignified existence is another question, but this period of privation is mercifully and uniquely limited. Six months of surplus income (or at least life on subsistence income, if no surplus is available) is a comparatively small price to pay for a discharge of debt. In this way the Russian law pursues the goal of creditor satisfaction a bit less aggressively than other European laws, which subject debtors to three to five or even more years on minimum budgets.<sup>290</sup> This six-month period, however, is actually a nice compromise between the waste inherent in extended and often fruitless European payment plans, on the one hand, and value left on the table in a U.S.-style get-out-of-jail-free asset-only liquidation, on the other hand. It is mildly concerning that the court is assigned discretion to lengthen this period, with no indication of the criteria or ultimate limit for such an extension,<sup>291</sup> but one hopes that courts will apply this provision sparingly and judiciously. The shorter income expropriation period makes Russian bankruptcy somewhat like a visit to the public bath (*banya*): Debtors jump in the ice bath for only a short time before returning to the steam room for rejuvenated health, then on to the lounge for beer and *vobla*.<sup>292</sup>

The Russian national pastime of hiding income from taxing authorities may complicate the creditor recovery goal here. A strikingly consistent over time one-third of Russians report that they (and their employers) evade tax by concealing part or even all of their income by receiving it "in an envelope" rather than paid through normal channels.<sup>293</sup> Salary distributed via

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289. See World Bank, *supra* note 60, ¶¶ 284–89.

290. See KILBORN, *supra* note 57, at 49–53.

291. See *supra* note 230 and accompanying text.

292. See *Pro pivo i voblu*, ZOLOTAYA VOBLA, <http://www.vobla.ru/o-pive> (last visited Apr. 9, 2016).

293. See GUSEVA, *supra* note 5, at 108; VTsIOM *vyyasnil, chto pochti kazhdyi tretii rossiyanin poluchaet zarplatu v konverte*, DP (Apr. 14, 2015, 12:37 PM), [http://www.dp.ru/a/2015/04/14/VCIOM\\_viyasnil\\_chno\\_kazhdij/](http://www.dp.ru/a/2015/04/14/VCIOM_viyasnil_chno_kazhdij/) (reporting

plastic card can be intercepted quite easily by the financial administrator; salary distributed in cash in an envelope is harder to seize. Public acceptance of this new regime may be undermined if debtors are perceived as taking undue advantage by accepting the statutory minimum income officially, but concealing significant excess income. There is no easy or obvious solution to this problem; some degree of inappropriate behavior by some debtors is simply inevitable. As the World Bank has observed, “perfect exclusion of fraud is not an achievable goal” and “[c]are should be taken to avoid sacrificing the great good of such a system simply because perfection cannot be assured.”<sup>294</sup>

A larger potential problem here concerns secured collateral, especially home mortgages. For many, and perhaps most, debtors, their home will be protected by the complete exemption of the value of the debtor’s only suitable residence.<sup>295</sup> The financial administrator will be prohibited from seizing such property, and debtors will retain their homes. For the limited number of debtors with home mortgages, however, the law creates a unique perverse incentive for the financial administrator to undermine both the rights of the mortgage creditor and the debtor in property subject to a mortgage (or other security interest, in the case of movable assets). If the value of the home (or other collateral) were reserved exclusively for the secured creditor, as it is in most bankruptcy systems in the world,<sup>296</sup>

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on a survey by national opinion pollster, VTsIOM, which found that 28 percent of Russians received unreported income from employers “in envelopes,” 13 percent concealed all of their income in this way and paid no taxes, while 15 percent concealed and evaded tax on only part of their income); *Pochti tret' rossiyan poluchayut zarplatu v konvertax*, VDVS (Oct. 11, 2006, 10:18 AM), <http://news.vdv-s.ru/society/?news=10059> (reporting on earlier VTsIOM survey finding 27 percent concealed income received “in an envelope,” 9 percent concealing all of their income, 18 percent concealing only part); see also *V Rossii predlozhili za zarplaty v konvertax sazhat' na tri goda*, KUBAN24 (July 17, 2015, 5:17 AM), <http://kuban24.tv/item/v-rossii-predlozili-za-zarplatyi-v-konvertah-sajat-na-tri-goda-123262> (reporting on a legislative initiative to combat employers’ concealing employees’ income “in envelopes,” a problem that the bill’s sponsors estimated occurs, at least to a certain degree, in 50 percent of wage payments).

294. World Bank, *supra* note 60, ¶¶ 115, 119.

295. See *supra* notes 236–37 and accompanying text.

296. See, e.g., RANKING AND PRIORITY OF CREDITORS (Dennis Faber et. al, eds., 2016) (responding to the General Outline question on “Ranking of insol-

debtors might preserve their homes post-bankruptcy by negotiating some arrangement with their mortgagees.<sup>297</sup>

In both corporate<sup>298</sup> and personal<sup>299</sup> bankruptcy cases in Russia, however, secured claims are subject to a unique carve-out that reserves 10 percent of the value of homes and other secured collateral for payment of unsecured claims (along with 10 percent for payment of unsatisfied case administration expenses). Financial administrators thus have an incentive in any case of a mortgaged property to sell the property in bankruptcy proceedings, distribute 10 percent of its value to unsecured creditors, and pocket a 2 percent commission on at least the amount distributed to unsecured creditors, if not the entire value of the liquidated property (since the other 80 percent is distributed by the administrator, as well, to the secured creditor).<sup>300</sup> As for the debtor's interest, the total exemption in the value of the debtor's only suitable home is not applicable to property encumbered by a mortgage.<sup>301</sup> If financial administrators use liquidation proceedings to extract value from mortgaged property in this way, expelling debtors from their mortgaged homes and undermining secured creditors' rights, the legislative intention will quite clearly have been frustrated. This will be one of the most sensitive questions of interpretation facing the courts in the first years of implementing the new law.

#### *d. Institutional Capacity: Will Corners Be Squared . . . or Cut?*

Whether or not this new system works well, roots out abuse, and ultimately delivers needed relief depends, in the final analysis, on one factor: the capacity of the courts and financial administrators, the two main administrative institutions, to

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vency claims<sup>3</sup> on whether secured creditors have priority in collateral value or are subject to a carve-out).

297. If the value of the property exceeds the loan secured by mortgage, the debtor's exemption in that value might protect it; otherwise, that free value becomes part of the bankruptcy estate subject to liquidation and distribution.

298. See Law 127-FZ, *supra* note 142, art. 138.

299. *Id.* art 213.27(5); see *supra* note 244.

300. See *supra* note 204.

301. GRAZHDANSKII PROTSESUAL'NYI KODEKS ROSSIISKOI FEDERATSII [Civil Procedural Code] [GPK RF] art. 446. It is not clear how the law treats partially encumbered homes, with value in excess of any mortgage. One would expect the courts to protect that value for debtors in light of the full exemption.

fulfill their tasks efficiently and effectively. Given the current limitations of and anticipated burdens on these two institutions, the expected volume of consumer bankruptcy cases raises cause for concern. At least in the beginning, if not thereafter, one of three things will likely happen: (1) efficiencies will develop to cut through needless formalism and square corners, (2) corners will be cut, or (3) the system will bog down and grind to a near standstill under an avalanche of cases.

#### i. The Courts

From the very introduction of the Ministry proposal for the new personal bankruptcy regime, the High Commercial Court<sup>302</sup> warned that the courts would be deluged with up to 204,000 petitions per year,<sup>303</sup> requiring 555 more commercial court judges in the first three years, significant investment in other personnel (1110 staff positions)—at least 500 million rubles per year, and if debt collection cases were not reduced, nearly 3 billion rubles in the first three years and 1.5 billion rubles per year thereafter—as well as for infrastructure for the commercial courts (6.8 billion rubles for construction).<sup>304</sup> It does

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302. In a move opposed by most legal experts, the High Commercial Court was eliminated in mid-2014 pursuant to a surprise initiative by President Putin, purportedly designed to unify the jurisprudential approach and oversight in commercial and civil cases by folding the High Commercial Court into the Supreme Court. See Peter H. Solomon, Jr., *The Unexpected Demise of Russia's High Arbitrazh Court and the Politicization of Judicial Reform*, 147 *RUSS. ANALYTICAL DIG.* 2, 2 (Apr. 17, 2014), <http://www.css.ethz.ch/publications/pdfs/RAD-147.pdf>; Yuliya Sinitsyna, *Ob"edinenie vysshix sudov, Chto Delat' obozrenie*, *CHTO DELAT' OBOZRENIYE* (Apr. 2014), <http://www.4do.4dk.ru/articles/obedinenie-vysshikh-sudov>. The lower commercial court system will continue to operate, but ultimate appeals will be heard, and doctrine and policy developed, by the Supreme Court.

303. Others estimated an even higher number, as up to two million Russians in 2012 had been the subject of unsuccessful debt collection proceedings. *Zakliucheniye Obshchestvennoi palaty RF*, *supra* note 175, at 1.

304. Finansovo-ekonomicheskoe obosnovanie k proektu federal'nogo zakona "O vnesenii izmenenii v Federal'nii zakon "O nesostoyatel'nosti (bankrotstve)" i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v chasti regulirovaniya reabilitatsionnykh protsedur, primenyaemykh v otnoshenii grazhdaninadolzhnika [Financial-Economic Implications of the Draft Bill of a Federal Law "On the Introduction of Amendments to the Federal Law "On Insolvency (Bankruptcy)" and Certain Legislative Acts of the Russian Federation Regulating Rehabilitation Procedures Applied with Respect to a Citizen-Debtor"] 1–2, in *Legislative History*, *supra* note 159.

not appear that these extra funds have been allocated, or that there are any plans to do so in the near future.<sup>305</sup> As recently as July 2015, similar entreaties for more personnel and infrastructure support have been voiced by the Moscow Commercial Court,<sup>306</sup> which likely stands to be most burdened by the new law.<sup>307</sup>

Any additional burden on the commercial courts will weigh heavily, as they are already substantially overburdened. The commercial courts handle a wide variety of economic disputes involving legal entities (including shareholder lawsuits) and individual entrepreneurs, as well as all bankruptcy cases.<sup>308</sup> The average caseload for a commercial court judge is about sixty matters per month, and the Moscow judges carry a staggering load of around two hundred cases per month.<sup>309</sup> Despite these burdens, these judges are relentlessly driven by scheduling deadlines.<sup>310</sup> One commentator notes “a bizarre obsession with time on the part of [commercial court] judges,”<sup>311</sup> and “the obsession of these judges with getting cases handled within the statutory deadlines.”<sup>312</sup> Especially in light of the case burdens

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305. This has been a steady trend for years, with the Chairman of the High Commercial Court requesting greater funding in meetings with President Putin, followed by rhetorical acknowledgment of the burden, but no additional funding. See Hendley, *supra* note 195, at 261.

306. See *Arbitrazh Moskvyy dlya iskov o bankrotstve fizlits prosit dopfinansirovanie*, RAPSINEWS (July 15, 2015, 5:57 PM), <http://rapsinews.ru/arbitration/20150715/274148628.html>.

307. For a comparison of the relative weight of caseloads on the various commercial courts, illustrating the disproportionate share falling on the Moscow City commercial court, see Hendley, *supra* note 195, at 246 tbl. 3.

308. See Kathryn Hendley, *Judges as Gatekeepers to Mediation: The Russian Case*, 16 CARDOZO J. CONFLICT RESOL. 423, 429 (2015). For a fascinating and rare insight into the operation of the commercial courts and the incentives of litigants (especially creditors) to use them, see Kathryn Hendley, *Business Litigation in the Transition: A Portrait of Debt Collection in Russia*, 38 L. & SOC'Y REV. 305 (2004).

309. See *Rukovodstvo ASGM rasskazalo o roste nagruzki, ocheredyax i podgotovke k bankrotstvu fizlits*, PRAVO.RU (July 15, 2015, 4:40 PM), [http://pravo.ru/court\\_report/view/120336](http://pravo.ru/court_report/view/120336); *Interv'yu eksperta po bankrotstvu grazhdan*, ASSOTSIATSIYA PODDERZHKI FIZICHESKIKH LITS PRI BANKROTSTVE (July 2, 2015), <http://bankrot127.ru/news/11002.html>.

310. See Hendley, *supra* note 195, at 261; see also *supra* note 209 and accompanying text.

311. Hendley, *supra* note 195, at 260.

312. *Id.* at 253.

they bear, the commercial courts have an extraordinary track record of meeting their statutory case deadlines.<sup>313</sup>

An inundation of new personal bankruptcy cases may well press the courts past their capacity for heroic observance of time limits. Leaders of the Moscow City commercial court have expressed confidence that they will be able to continue to meet statutory deadlines even in the face of an onslaught of new personal bankruptcy cases,<sup>314</sup> but at what cost? If the conveyor belt does not slow down, operations on the much greater number of units will have to be accelerated, either through a significant increase in efficiency or in short-cuts of some kind. The commercial courts already seem to be operating above efficient capacity, so short-cuts are the only remaining option. Commercial court judges seem to have resigned themselves to the reality of efficiency-driven trade-offs. A particularly knowledgeable observer describes that “[m]ore than one [commercial court] judge has bemoaned the ‘conveyor belt’ quality of the justice they are able to mete out under these circumstances.”<sup>315</sup> They have already been forced to cut corners in the process of opinion writing.<sup>316</sup> Both the conveyor-belt problem and the corner-cutting problem will be magnified exponentially if the commercial courts have to contend with hundreds of thousands of personal bankruptcy petitions each year.

Where will the courts economize? Primarily in the one ruling that requires their serious attention: the evaluation of debtors’ “insolvency.”<sup>317</sup> On this and other matters, judges will likely face a choice of applying one of two opposing time-saving presumptions: either most debtors are insolvent and should be admitted to the procedure (otherwise, why would they subject themselves to this process and its attendant disabilities?) or most debtors are solvent and are opportunistically evading their debts (a common fear among bankers, in particular). Only if the documentation presented undermines one of these presumptions will the court make the nonpresumptive ruling; that

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313. See *id.* at 260.

314. See *Arbitrazh Moskvy dlya iskov o bankrotstve fizlits prosit dopfinansirovanie*, *supra* note 305; *Rukovodstvo ASGM rasskazalo o roste nagruzki, ocheredyax i podgotovke k bankrotstvu fizlits*, *supra* note 309.

315. Hendley, *supra* note 195, at 260.

316. *Id.* (noting that, as a result of time pressures, judges “sometimes cut corners in their opinion writing”).

317. See *supra* notes 197–200 and accompanying text.

is, on admission or rejection of the petition. The choice that commercial court judges as a whole make on this question in particular will determine, perhaps more than anything else, whether the system works smoothly or not. If the courts choose the conservative route, presuming abuse and strictly limiting access to relief, this will powerfully undermine the legislative intent behind the law, the international best practice of open access, and the benefits of a portfolio regime like personal bankruptcy.

Indeed, one has to wonder why the courts must be involved here at all. There is nothing especially dispute-oriented about establishing a debtor's insolvency and ordering an objective application of the liquidation process. An administrative body, not encumbered by other business, would achieve this perfectly well, leaving the parties with a right to appeal unfavorable rulings to the courts if they so wished. That is exactly what Sweden did in 2007.<sup>318</sup> The continued insistence on multiple hearings and court confirmation of undisputed matters<sup>319</sup> is a puzzling fixation with formalism in a context that demands flexibility and efficiency.

## ii. Financial Administrators

In terms of contact time and responsibility for making the process unfold, the financial administrator plays an arguably greater role than the court, so capacity constraints would really hit hard here. Administrators bear a huge amount of responsibility for convening meetings of creditors, collecting and evaluating claims, and analyzing and reporting on the debtor's financial situation and restructuring plan.<sup>320</sup> Further, administrators liquidate the debtor's nonexempt assets, collect the debtor's nonexempt income, and distribute value to creditors.<sup>321</sup> Moreover, the financial administrators are the first line of defense against abuse of the system by debtors. If assets are conveyed away or otherwise concealed, the financial administrator

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318. See Kilborn, *Out with the New*, *supra* note 273, at 460–61; see also *supra* notes 272–74 and accompanying text.

319. A particularly notable example of this is the requirement for a court hearing upon conclusion of a restructuring plan, even if no one objects and the debtor has satisfied his or her obligations. See Law 127-FZ, *supra* note 142, art. 213.22(4)–(5).

320. See *id.* art. 213.9.

321. *Id.*



is responsible for finding and retrieving this value (and opposing the debtor's discharge), which could well give rise to one or more additional lawsuits in the course of any given personal bankruptcy case.<sup>322</sup> Administrators have not only a duty but also a significant monetary incentive to challenge fraudulent conveyances, root out concealed value for creditors, and thereby police the system against abuse—they receive 2 percent of any recoveries distributed to creditors.<sup>323</sup>

In the ordinary case, however, which likely will not involve significant value from either challenged pre-bankruptcy transactions or exempt assets or income, the financial incentives for all of this work seem rather limited. One wonders whether qualified administrators will be attracted to this industry for 10,000 rubles per case (about \$500 USD). In comparative terms, trustees in consumer liquidation cases in the United States earn only about one-tenth this much per case (\$60 USD), but there are far fewer of them and therefore likely greater opportunity to aggregate value through large numbers of simple cases.<sup>324</sup> Without a central regulator in Russia, it will fall to the SROs<sup>325</sup> to ensure that their members take on personal bankruptcy cases, perhaps in part by equitably allocating assignments of high-value business cases and low-value consumer cases among their member administrators.

Many new SRO companies are predicted to enter what will be a rapidly growing personal bankruptcy field in Russia.<sup>326</sup> At least in the large urban concentrations, like Moscow and St.

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322. "Suspicious transactions" implemented by the debtor within the previous one or three years can be declared null and the value returned to the estate (the functional equivalent of constructive and actual fraudulent conveyances, respectively, in the United States), along with certain transactions that prefer one creditor over others during the preceding several months. *Id.* arts. 61.2–3.

323. See *supra* note 204. The extra 2 percent commission on value distributed to creditors exacerbates the problem of mortgaged property, however, discussed above. See *supra* note 244 and accompanying text.

324. See 11 U.S.C. § 330(b) (designating \$60 from the filing fee for each consumer bankruptcy case for the trustee); *Who is a Chapter 7 Panel Trustee, Bankruptcy FAQ*, NAT'L ASS'N BANKR. TRUSTEES, <http://www.nabt.com/faq.cfm#Q5> (last visited Mar. 19, 2016) (reporting a total of 1000 panel trustees managing over one million consumer filings annually).

325. See *supra* note 202 and accompanying text.

326. See Artyom Aldanov, *Fizlits po oseni schitayut*, KOMMERS. (July 27, 2015), <http://kommersant.ru/doc/2774302>.

Petersburg, significant competition may well develop among these SROs to get debtors to nominate them to choose case administrators from among their members.<sup>327</sup> How this competition unfolds, and especially how it affects the behavior of financial administrators within individual personal bankruptcy cases, will be quite important to the healthy development of this new regime.

## CONCLUSION

Russia is the ninth most populous country in the world, and the second most populous country with a modern personal bankruptcy procedure (after the United States).<sup>328</sup> If Russia's new system functions effectively, it will be a bellwether for other Eastern European countries (and perhaps China) considering implementing similar procedures to achieve similar goals. All indications are that Russia has chosen a structure that reflects mainstream European standards and international best practices. If fears of rampant abuse by opportunistic debtors are allayed, and administrative capacity concerns are overcome, the Russian approach will have proven itself worthy of emulation. In slightly more than two decades, Russia has emerged from Communism, witnessed the organic and explosive growth of a consumer credit market, and developed a sophisticated legal mechanism for treating the inevitable resulting rampant individual financial distress. In the face of an oil market in free fall and a severe contraction in gross domestic product threatening a national recession,<sup>329</sup> this new mechanism could not arrive too soon for Russia's citizen-debtors.

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327. For an extremely revealing discussion of a comparable system in which competition among trustees arose, see Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 AM. BANKR. L.J. 399, 423–33 (2000).

328. See *Country Comparison: Population*, WORLD FACTBOOK (July 2015), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>.

329. See Anna Andrianova, *Russian GDP Plunges 4.6%*, BLOOMBERG (Aug. 10, 2015, 12:21 PM), <http://bloom.bg/1P125Dz>.