



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
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\* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Russia produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

### Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

**1. Does the law of the Russian Federation contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?**

1. Russian law does not contain such direct provisions in relation to disputes in arbitration and subject to an arbitration agreement (for more details see answer to Question 2, paragraphs 17-32 below).<sup>1</sup>
2. The effects of the opening of insolvency proceedings on the possibility to commence or continue arbitration proceedings arise from insolvency legislation, as well as from arbitration legislation concerning arbitrability, interpreted by state courts and legal authorities (see answers to Question 2, paragraph 3, and paragraphs 17-32).

**2. Does the insolvency legislation in the Russian Federation provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**

- a. Which disputes fall under the rules on *vis attractiva concursus*?**
- b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

3. Yes, Russian law provides for the concentration of disputes concerning the insolvent debtor. However, there is no separate insolvency court *per se*. Rather the state arbitration court (commercial state court), hearing all commercial disputes involving commercial legal entities and entrepreneurs, opens an insolvency case and acts in the insolvency mode, ie in line with specific insolvency legislation and procedures.<sup>2</sup> Bankruptcy cases are to be considered by the

<sup>1</sup> Please note that Russian law provides for a number of specifics regarding individuals' bankruptcy. We do not elaborate on them in this report.

<sup>2</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 32(1). For the full text of this section, please click the link here: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_39331/ff46a0885d94e832bf8efba85193100e8a969a75/](http://www.consultant.ru/document/cons_doc_LAW_39331/ff46a0885d94e832bf8efba85193100e8a969a75/).

state arbitration court (commercial state court) at the location of the debtor—at the place of registration of a company or at the place of residence of a person.<sup>3</sup>

4. As a general rule, after opening the insolvency proceedings (from the date of introduction of the monitoring stage which is the first stage in insolvency proceedings), all monetary claims shall be submitted to the state arbitration court handling the insolvency proceedings.<sup>4</sup> Nevertheless, Russian law contains several exceptions to the *vis attractiva concursus* rule:

- (i) vindication claims,<sup>5</sup> ie claims of property owners against non-owners illegally possessing such property for the transfer of such property into the owners' possession,
- (ii) claims for the recognition of property rights,<sup>6</sup>
- (iii) claims of insolvent company's counterparties (but not claims filed by such company's insolvency administrator) to challenge transactions and apply the consequences of their invalidity based on the general civil law grounds such as illegality, deception, delusion, etc.,<sup>7</sup>
- (iv) claims concerning "current payments",<sup>8</sup> ie the following claims:
  - monetary claims under commercial, civil, and certain other contracts concerning:
    - a. monetary obligations that arose after the first claim for initiating insolvency proceedings had been filed,
    - b. monetary obligations that arose before the first claim for initiating insolvency proceedings had been filed but becoming due after the date of such first claim,
    - c. payments for goods, works, and services delivered, performed, and rendered after the first claim for initiating insolvency proceedings had been filed, including contracts concluded before the date of such first claim,
  - claims for payment of severance pay and wages under employment contracts that arose after the first claim for initiating insolvency proceedings had been filed, and

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<sup>3</sup> *ibid*, art 33(1).

<sup>4</sup> *ibid*, art 33(3).

<sup>5</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.12.2010 N 63, para 16.

<sup>6</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 22.06.2012 N 35, para 34.

<sup>7</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.12.2010 N 63, para 17.

<sup>8</sup> Federal Law of 26.10.2002 N 127 FZ "On insolvency (bankruptcy)", art 63(1).

- claims for mandatory payments that arose after the first claim for initiating insolvency proceedings had been filed.<sup>9</sup>
5. As to whether disputes subject to an arbitration agreement are covered by the *vis attractiva concursus*, the rules applicable to claims in state courts are the following: once the monitoring stage is introduced, all new monetary claims shall be submitted in the bankruptcy case. If new claims are filed in a different state court, they shall be left by the state court without consideration (except for the cases specified in paragraph 4 above).<sup>10</sup> Claims that had been filed before the monitoring phase commenced can be either transferred to the bankruptcy case on application of the claimant or resolved within the ongoing regular (not bankruptcy) court case (see paragraphs 25-27 below). According to the court practice, in the absence of such application, the court proceeds with the case in the regular way and does not transfer it to the bankruptcy court.<sup>11</sup> The court is not entitled to transfer the dispute to the insolvency proceedings on its own initiative or at the defendant's request.<sup>12</sup>
  6. If a claim is filed after the introduction of the monitoring stage and heard on the merits, (except for "current payments" referred to above) it still can be further included in the register of creditors' claims in insolvency proceedings (see paragraphs 29-32 below), but the creditors can object to that by arguing that it infringes their rights.<sup>13</sup>
  7. Russian law does not specifically provide whether disputes in arbitration or subject to an arbitration agreement are covered by these rules or not. Please see paragraphs 17-32 below for details.

**3. What are the effects (if any) of the opening of insolvency proceedings in the Russian Federation on the possibility to commence or continue arbitration proceedings?**

**In answering this question, please address separately each of the following points:**

- a. **Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?**

8. This issue is not directly dealt with in Russian statutory law. According to the court practice and legal authorities,<sup>14</sup> the impact of insolvency on arbitration depends on the party to the arbitration agreement which becomes insolvent. If claimant is insolvent, no negative

<sup>9</sup> *ibid*, art 5(1).

<sup>10</sup> Code of Arbitration Procedure of the Russian Federation of 24.07.2002 N 95-FZ, art 148(1)(4). For the full text of this section, please click the link here: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_37800/8bb4dcd3c32777f88ed6fcc15123f2a13b4356f2/](http://www.consultant.ru/document/cons_doc_LAW_37800/8bb4dcd3c32777f88ed6fcc15123f2a13b4356f2/); Code of Civil Procedure of the Russian Federation of 14.11.2002 N 138-FZ, art 222.

<sup>11</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 22.06.2012 N 35, paras 27 and 28.

<sup>12</sup> *ibid*, para 28.

<sup>13</sup> *ibid*, para 27.

<sup>14</sup> International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal "Arbitration court"; M.: Statute, 2018. 9. P. 965.

consequences for the arbitration agreement arise under Russian law.<sup>15</sup> The Russian Supreme Court has pointed out that insolvency of the claimant may be a factor in assessing whether enforcement of the arbitration agreement will violate the claimant's right of access to court and the agreement should not be enforced for this reason. However, the court stressed that the critical issue is whether the claimant actually lacks funds or other ways to pursue arbitration, not the formal status.<sup>16</sup> If insolvency proceedings are opened against the defendant (debtor), a number of consequences are possible—please see paragraphs 17-32 below.

**b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?**

9. No, the law does not make any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company (see also paragraphs 13-16 below).

**c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?**

10. The law does not directly address this issue. Without mentioning those disputes which are, in general, not arbitrable or conditionally arbitrable under Russian law irrespective of the bankruptcy element, one can note two types of arbitration disputes which are distinguished in the context of bankruptcy:
- (i) disputes carved out from the *vis attractiva concursus* rule; and
  - (ii) disputes concerning the validity of transactions arising out of special provisions of the Russian insolvency legislation involving banks, pension funds, and/or insurance companies where provisional administration (rehabilitation) has been introduced in respect of such a bank/pension fund/insurance company, but where no insolvency proceedings have commenced yet.
11. In relation to disputes carved out from the *vis attractiva concursus* rule, please refer to paragraphs 3 and 20.

<sup>15</sup> Ruling of the Constitutional Court of the Russian Federation of 05.26.2011 N 10-P; Ruling of the Supreme Court of the Russian Federation of 05.16.2016 N 304-ЭC16-3766; Ruling of the Supreme Court of the Russian Federation of 29.09.2016 N 307-ЭC16-12344; Ruling of the Arbitration Court of the Moscow District of 18.07.2014 N Ф05-8113/2014 in the case N A41-66081/13.

<sup>16</sup> Ruling of the Supreme Court of the Russian Federation of 12.07.2017 N 307-ЭC17-640.

12. According to a ruling of the Supreme Court of the Russian Federation<sup>17</sup> and certain further court practice,<sup>18</sup> such disputes, at least as far as they concern banks, are not arbitrable as having “public nature” and involving a “social dimension”. Further, the Constitutional Court of the Russian Federation on the same topic explained that bank reorganization indicates an unstable financial situation of a credit organization, which threatens the interests of its creditors (depositors) and the stability of the overall banking system.<sup>19</sup>

**d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?**

13. The effects of insolvency on arbitration extend to insolvency proceedings which do not require a declaration of insolvency. Under Russian law, two stages of insolvency proceedings are essential: the monitoring stage and the receivership. The monitoring stage is the first stage in the insolvency proceedings and is introduced before declaration of insolvency. The monitoring stage is introduced in order to ensure the safety of the debtor’s assets, to analyze the financial standing of the debtor, to put up the register of creditors’ claims, and to conduct the first creditors’ meeting.<sup>20</sup> As discussed in paragraph 5, as a general rule, as soon as the monitoring stage is introduced, all new monetary claims shall be submitted to the bankruptcy case.
14. The other procedure of a crucial importance is the receivership, which results, among other things, in the liquidation of organization.<sup>21</sup> The opening of the receivership is based on the declaration of the debtor being deemed insolvent (bankrupt) by the competent state court.<sup>22</sup> Since that, all monetary claims (with exceptions discussed in paragraphs 4 and 20) shall be submitted to the bankruptcy case.<sup>23</sup>
15. The law does not directly provide for the consequences of both discussed stages for arbitration. According to the state court practice, once the receivership is introduced, the tribunal loses its competence to hear the case.<sup>24</sup> This logic is applied by state courts in the cases on enforcement of arbitral awards, as well.<sup>25</sup> However, there is at least one court

<sup>17</sup> Ruling of the Supreme Court of the Russian Federation of 16.08.2016 N 305-ЭC16-4051.

<sup>18</sup> The decision of the Arbitration Court of the Moscow District of 24.07.2019 N Ф05-11687/2019 in the case N A40-90724/2018.

<sup>19</sup> Ruling of the Constitutional Court of the Russian Federation of 01.10.2019 N 2563-O.

<sup>20</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 2.

<sup>21</sup> *ibid*, art 149(3).

<sup>22</sup> *ibid*, art 124(1).

<sup>23</sup> *ibid*, art 126(1).

<sup>24</sup> Ruling of the Judicial board for Civil Cases of the Supreme Court of the Russian Federation of 17.09.2019 N 4-KG19-36.

<sup>25</sup> Ruling of the Supreme Court of the Russian Federation of 17.09.2019 N 4-KG19-36; Ruling of the Ninth Arbitration Court of Appeal of 21.12.2012 N 09АП-38027/2012 in the case of N A40-41119/11-70-196Б; Ruling of the Supreme Arbitration Court of the Russian Federation of 13.11.2012 No. BAC-8141/12 in the case N A45-15248 / 2011; Ruling of the Ninth Arbitration Court of Appeal of 19.11.2012 N 09АП-31889/2012 in the case of N A40-31270/07-36-79B.

decision to the opposite providing for enforceability of an arbitration agreement and competence of the tribunal to hear the case.<sup>26</sup> This state court decision, however, does not have any precedential value and does not alter the conclusions made above on the basis of superior court rulings.

16. The disputes concerning the validity of transactions arising out of special provisions of the Russian insolvency legislation involving banks where provisional administration (rehabilitation) has been introduced in respect of a bank, but where no insolvency proceedings have commenced yet, are not arbitrable—please refer to paragraph 12.

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?**

17. Russian law does not contain any specific provisions on this issue. The following possible situations may receive different treatment:
- (i) arbitral award issued and enforcement application filed to a state court before commencement of the insolvency proceedings;
  - (ii) arbitral award issued before commencement of the insolvency proceedings but enforcement application not filed to a state court;
  - (iii) arbitration already pending when insolvency proceedings commence; and
  - (iv) arbitration not commenced before insolvency proceedings commence.
18. Before discussing different treatment of those four scenarios, one can note the trend, with certain exceptions,<sup>27</sup> in the practice of the Russian state courts not to enforce the arbitral awards and not to include the respective debts into the register of creditors' claims in the bankruptcy case, irrespective of the particular scenario mentioned. The courts follow the logic that in the bankruptcy case, other creditors may raise their objections on the same legal grounds as those applicable to refusing to enforce an arbitral award, in particular referring to unenforceability of the award because it affects the rights of third parties (other creditors).<sup>28</sup> Other creditors cannot participate in and raise arguments in the arbitration, and thus, their rights in the insolvency procedure are affected. According to the state courts, arbitral awards interfere with the bankruptcy procedure while this procedure pursues the public aim of

<sup>26</sup> Ruling of the Thirteenth Arbitration Court of Appeal of 03.09.2015 N 13АП-19001/2015 in the case N A56-7520/2015.

<sup>27</sup> Ruling of the Arbitration Court of the Volga District of 09.17.2019 in the case N A06-11201/2018.

<sup>28</sup> Ruling of the Supreme Court of the Russian Federation of 09.10.2015 in the case N 305-КГ15-5805, A41-36402/12; Ruling of the Arbitration Court of the West Siberian District of 23.03.2017 N Ф04-775/2017 in the case N A81-4101/2016; Ruling of the Arbitration Court of the East Siberian District of 13.10.2011 in the case N A74-1172/2011; Ruling of the Arbitration Court of the North-Western District of 04.09.2003 N A05-3104/03-126/23.

preserving the interests of all parties involved in the bankruptcy procedure.<sup>29</sup> Such interference is often treated by the Russian state courts as a contradiction to Russian public policy, thus making the whole exercise useless, irrespective of the particular scenario mentioned.<sup>30</sup>

19. Having said that, we note that a number of such state court decisions were rendered in the context of agreements and arbitral awards which, at least on their face, seemed not commercially driven but rather orchestrated (eg, due to one or more of the following factors: extremely quick arbitrations; arbitrations with no objections from the debtor; arbitrations with no hearings and parties failing to attend the oral hearing; arbitral awards rendered immediately before commencement of the insolvency proceedings). Nevertheless, the formal ground for refusing to enforce the arbitral awards in the referenced decisions was contradiction of public policy.
20. Separately, it is worth noting that the court practice on the claims carved out from the *vis attractiva concursus* rule (see paragraph 4) and referred to arbitration is controversial. Some decisions follow the logic discussed in paragraph 18.<sup>31</sup> Other courts enforce the arbitral awards out of the insolvency proceedings based on the fact that the disputes in question are directly carved out by the law from the *vis attractiva concursus* rule.<sup>32</sup> It should be, however, noted that the court decisions of both trends relate to the “current payments”, ie claims for payments that arose after the commencement of the insolvency proceedings. Therefore, it is not clear that the courts would apply this same reasoning to claims arising prior to the commencement of the proceedings.
21. We discuss the specific scenarios above in turn.
  - (i) Arbitral award issued and enforcement application filed to a state court before commencement of the insolvency proceedings:

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<sup>29</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.07.2009 N 60, para 4.

<sup>30</sup> Ruling of the Supreme Court of the Russian Federation of 5.12.2016 N 305-ЭC16-10852; Ruling of the Arbitration Court of the West Siberian District of 09.07.2018 N Ф04-2440/2018 in the case N A27-10847/2017; Ruling of the Supreme Court of the Russian Federation of 19.07.2018 N 306-ЭC16-19550 (7) in the case N A55-25483/2015; Ruling of the Arbitration Court of the Volga District of 27.11.2018 N Ф06-38909/2018 in the case N A65-25038/2017.

<sup>31</sup> Ruling of the Supreme Court of the Russian Federation of 21.10.2014 N 301ЭC14-1657; Ruling of the Arbitration Court of the Volga-Vyatka District of 01.24.2018 N Ф01-6185/2017 in the case N A82-16523/2017; Resolution of the Supreme Arbitration Court of the Russian Federation of 28.05.2012 No. BAC-5901/12 in the case N A21-5591/2011; Ruling of the Arbitration Court of the East Siberian District of 06.29.2017 N Ф02-3153/2017 in the case N A33-21111/2016; Ruling of the Arbitration Court of the Moscow District of 04.24.2018 N Ф05-4412/2018 in the case N A40-189912/2017.

<sup>32</sup> Ruling of the Arbitration Court of the Moscow District of 26.03.2018 N Ф05-3006/2018 in the case N A40-189594/17; Ruling of the Arbitration Court of the Volga District dated 24.12.2014 N Ф06-18709/2013 in the case N A12-21532/2014; Ruling of the Arbitration Court of the Ural District of 08.21.2014 N Ф09-4987/14 in the case N A50-6832/2014; Ruling of the Arbitration Court of the Volga District dated 04.24.2012 in the case N A65-24565/2011.

22. Russian law does not contain any specific provisions on this scenario. According to court practice<sup>33</sup> and legal authorities,<sup>34</sup> the general rules discussed in paragraph 5 apply.
23. Under Russian law, the enforcement procedure has two stages. The first is the enforcement procedure finalised by a court decision on enforcement or non-enforcement of the award. The second stage is the execution of the court decision through bailiff service. Thus, in this scenario, the claimant may:
- continue the enforcement case up to the court decision and submit it to the insolvency case, instead of continuing with the second stage, to be included into the register of creditors. In such scenario, when joining the register of creditors, the creditors, the authorized state body, or the insolvency administrator may challenge the enforcement decision if it affects their rights and obligations in insolvency proceedings.<sup>35</sup> The court in this case should investigate whether enforcement of an arbitral award entails any violation of other creditors' rights and legitimate interests<sup>36</sup>—see paragraph 18 on this; or
  - discontinue the existing enforcement action, and submit the arbitral award to the bankruptcy case following the *vis attractiva concursus* rule. Under Russian law, after the monitoring stage is introduced, writs of execution shall not be issued.<sup>37</sup> Therefore, in such scenario, the court hearing the bankruptcy case will consider the application for arbitral award enforcement on the same legal grounds as in the ordinary enforcement action.<sup>38</sup> The creditors and the insolvency administrator may raise arguments as to why the arbitral award shall not be enforced based on the general legal grounds of not enforcing arbitral awards under arbitration laws.<sup>39</sup> This may lead to the consequences discussed in paragraph 18 above.
- (ii) Arbitral award issued before commencement of insolvency proceedings but enforcement application not filed to state court:
24. Russian law does not contain any specific provisions on this scenario. If the enforcement application is submitted to the state court in the ordinary procedure, the state court shall not proceed with the enforcement application.<sup>40</sup> The claimant shall file the enforcement

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<sup>33</sup> Review of judicial practice of the Supreme Court of the Russian Federation of 04.13.2016 N 1; Ruling of the Arbitration Court of the Moscow District of 27.11. 2019 N Ф05-21461/2018 in the case N A40-111339/2018.

<sup>34</sup> International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal "Arbitration court"; M.: Statute, 2018. 9. P. 965.

<sup>35</sup> Review of judicial practice of the Supreme Court of the Russian Federation of 04.13.2016 N 1.

<sup>36</sup> Ruling of the Arbitration Court of the Volga District of 09.17.2019 in the case N A06-11201/2018.

<sup>37</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 63(1).

<sup>38</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.07.2009 N 60, para 4.

<sup>39</sup> *ibid.*

<sup>40</sup> Review of judicial practice of the Supreme Court of the Russian Federation of 04.13.2016 N 1.

application to the bankruptcy case following the *vis attractiva concursus* rule, as described in paragraph 23 (bullet point two).<sup>41</sup>

(iii) Arbitration is already pending when insolvency proceedings start:

25. Russian law does not contain any direct provisions on the impact of insolvency on the ongoing arbitration. As discussed in paragraph 5, under Russian law, ongoing state court disputes shall be transferred to the bankruptcy case at the request of the claimant.<sup>42</sup> As to arbitration, according to several arbitral awards<sup>43</sup> and legal doctrine,<sup>44</sup> an arbitration pending at the time of introduction of the monitoring stage may be continued. However there is limited court practice supporting this position.<sup>45</sup>
26. There are several drawbacks if the claimant decides to proceed with arbitration. First, the claimant, until it becomes a participant of the insolvency proceedings, does not have any rights in the insolvency proceedings. For instance, it is not allowed to raise objections against other creditors' claims.<sup>46</sup> Second, under the law, the monitoring stage shall last approximately 6 to 7 months<sup>47</sup> (in practice and not infrequently, it takes longer). The period during which a claim can be included in the register of creditors' claims is 30 days from introduction of the monitoring stage or 2 months from introduction of the receivership stage.<sup>48</sup> If the monitoring stage is followed by the receivership (which is not uncommon), claimant has not more than 9 months to complete the arbitration and file an application to join the register of creditors based on the award. Claims included in the register are satisfied first.<sup>49</sup> If there are claims outside the register, such claims are satisfied from the remainder of the debtor's assets. So, there may well be insufficient debtor's assets remaining to satisfy the arbitral award holder if it has not joined the register in time. In addition, as discussed in paragraph 23, the creditors and the insolvency administrator may raise arguments as to why the arbitral award shall not

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<sup>41</sup> Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 22.12.2005 N 96, para 3; Scientific and practical commentary on the legislation on arbitration/M.N. Akuev, M.A. Akchurina, T.K. Andreeva et al.; ed. V.V. Khvalev. M.: RAA, 2017. P. 935.

<sup>42</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 63(1).

<sup>43</sup> Ruling of the ICAC at the CCI of the Russian Federation of 24.01.2000 in the case N 417/1998; Ruling of the ICAC at the CCI of the Russian Federation of 17.09.2002 in case No. 38/2002; Ruling of the ICAC at the CCI of the Russian Federation of 11.11.2002 in case No. 52/2002.

<sup>44</sup> International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal "Arbitration court"; M.: Statute, 2018. 9. P. 965; Karabelnikov, B.R. Enforcement and contestation of decisions of international commercial arbitration. Commentary on the 1958 New York Convention and chapters 30 and 31 of the Code of Arbitration Procedure Code of the Russian Federation of 2002. 3rd ed., Revised. and add. M.: Statute, 2008. 606 p.

<sup>45</sup> Ruling of the Arbitration Court of the Volga District of 16.05.2012 in the case N A65-629/2012; Ruling of the Arbitration Court of the East Siberian District of 13.10.2011 in the case N A74-1172/2011.

<sup>46</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 100(3).

<sup>47</sup> *ibid*, art 51 and 62(3).

<sup>48</sup> *ibid*, art 71(1) and 142(1).

<sup>49</sup> *ibid*, art 142(4).

be enforced based on the general legal grounds of not enforcing arbitral awards under arbitration laws.<sup>50</sup>

27. Alternatively, the claimant may stop arbitration and file a claim to the state court hearing the bankruptcy case notwithstanding the arbitration agreement following the *vis attractiva concursus* rule.

28. Separately, as discussed in paragraph 18, the arbitral award may be not enforceable in the bankruptcy case due to contradiction with the Russian Federation public policy.

(iv) Arbitration has not commenced before insolvency proceedings commence:

29. Russian law does not provide for any specific provisions dealing with such situation. The rules applicable to disputes in state courts are discussed in paragraph 5 above. In general, the courts apply these rules to arbitration initiated after opening the insolvency proceedings<sup>51</sup> to the effect that notwithstanding the arbitration agreement, the claim shall be filed to the state court bankruptcy case.

30. According to certain court decisions and legal authorities, in such a situation, the arbitration agreement may be considered valid but *temporarily* unenforceable by virtue of Russian law imperative provisions on *vis attractiva concursus* rule until the end of insolvency proceedings and shall follow the same path as the claims in state court.<sup>52</sup> Another approach is that such situation, provided that the claim is a monetary one, falls under the notion of “current payments”—see paragraph 20.

31. Having said that, one can note that if the arbitration is nevertheless initiated, it is up to the arbitral tribunal to decide whether to proceed with it or dismiss it based on the lack of its competence.<sup>53</sup> According to the legal authorities,<sup>54</sup> if the tribunal decides to hear the case, the creditor can try to include its claim based on the arbitral award into the register of creditors’ claims. However, as discussed in paragraph 23, the creditors and the insolvency

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<sup>50</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.07.2009 N 60, para 4.

<sup>51</sup> Ruling of the Supreme Court of the Russian Federation of 21.10.2014 N 301-ЭС14-1657; Ruling of the Arbitration Court of the West Siberian District of 03.23.2017 N Ф04-775/2017.

<sup>52</sup> Ruling of the Arbitration Court of the West Siberian District of 23.03.2017 N Ф04-775/2017; International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal “Arbitration court”; M.: Statute, 2018. 9. P. 965; Karabelnikov, B.R. Enforcement and contestation of decisions of international commercial arbitration. Commentary on the 1958 New York Convention and Code of Arbitration Procedure Code of the Russian Federation of 2002. 3rd ed., Revised. and add. M.: Statute, 2008. 606 p, chps 30 and 31.

<sup>53</sup> International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal “Arbitration court”; M.: Statute, 2018. 9. P. 965.

<sup>54</sup> International Commercial Arbitration: Textbook/S.A. Abesadze, T.K. Andreeva, V.N. Anurov et al.; ed. T.A. Lunaev; academic ed. O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. 2nd ed., Revised. and add. SPb.: Editorial office of the journal “Arbitration court”; M.: Statute, 2018. 9. P. 965; Karabelnikov, B.R. Enforcement and contestation of decisions of international commercial arbitration. Commentary on the 1958 New York Convention and Code of Arbitration Procedure Code of the Russian Federation of 2002. 3rd ed., Revised. and add. M.: Statute, 2008. 606 p, chps 30 and 31.

administrator may raise arguments as to why the arbitral award shall not be enforced based on the general legal grounds of not enforcing arbitral awards under arbitration laws<sup>55</sup> and, as discussed in paragraph 18, the arbitral award may be not enforceable in the bankruptcy case due to contradiction with the Russian Federation public policy.

32. The situation where it still may be worth proceeding with arbitration is when the claimant intends to enforce the award abroad or after the insolvency proceedings are finalized. Provided that the debtor is not liquidated as a result of insolvency proceedings, such award may be enforced in the ordinary way.

**f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?**

33. No, the law does not make any distinction.

**g. Do those effects intend to apply extraterritorially, ie to every arbitration regardless of the location of the seat in the Russian Federation or abroad?**

34. Under Russian law, the relations with foreign creditors are subject to Russian insolvency law in equal terms as with domestic creditors.<sup>56</sup> Russian law does not contain any specific provisions on the applicability of the above effects to arbitration. However, Russian courts routinely apply Russian insolvency laws to arbitration regardless of its seat, including arbitrations seated abroad and foreign arbitral awards.

**h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

35. As already noted above, the effects differ depending on the stage of insolvency proceedings. The first effect starts to operate from the date of filing the first claim for initiating insolvency proceedings. From the date of such claim, all new monetary claims are considered as claims for current payments that are carved out from the *vis attractiva concursus* rule (please see paragraph 4(iv) above). However, the major effect of insolvency proceedings on arbitration is operative once the monitoring stage is introduced (please see paragraph 5 above).

<sup>55</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 23.07.2009 N 60, para 4.

<sup>56</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 1(5).

- 4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**
- a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?**
- b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?**

36. The law does not contain any provisions that would allow any relief from the effects of insolvency on arbitration.
37. Russian law does not provide an option for an interested party to seek to intervene in the insolvency proceeding in order to proceed with arbitration. As discussed in paragraphs 25-27, a creditor under the arbitration agreement can file a claim against the debtor with the state court handling the insolvency proceedings instead of arbitration. The law and court practice do not allow the state court to send the matter to arbitration. Rather, it is the claimant's decision to proceed with the arbitration or file a claim with the state court following the *vis attractiva concursus* rule.

- 5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?**

38. This issue is not dealt with directly in Russian law. The insolvency legislation provides that the state court considering the bankruptcy case, at the request of a person participating in the bankruptcy case, is entitled to take interim measures allowed by the procedural laws.<sup>57</sup> The procedural legislation allows to take interim measures:
- if a failure to take such measures would make it difficult or impossible to enforce the state court ruling, including execution of court rulings abroad.<sup>58</sup> According to the Supreme Arbitration Court ruling, the difficulties or impossibility to enforce a court ruling may be associated with the lack of debtor's assets or actions taken to reduce its assets.<sup>59</sup>
  - to prevent significant damage to the applicant.<sup>60</sup>
39. The list of interim measures provided for by the procedural legislation is not exhaustive. It includes, inter alia, the prohibition for the defendant and other persons to take certain actions relating to the subject matter of the dispute.<sup>61</sup> However, anti-arbitration injunctions are not

<sup>57</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 46(1).

<sup>58</sup> *ibid*, art 90(2).

<sup>59</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 12.10.2006 N 55, para 9.

<sup>60</sup> Code of Arbitration Procedure of the Russian Federation of 24.07.2002 N 95-FZ, art 90(2).

<sup>61</sup> Code of Arbitration Procedure of the Russian Federation of 24.07.2002 N 95-FZ, art 91(2).

included in the list of interim measures. According to legal authorities,<sup>62</sup> the above rules provide for theoretical legal grounds to obtain an anti-arbitration injunction both domestically and abroad.

40. There are only a few court decisions on the topic. In all of them, the courts refused to grant any anti-arbitration injunctions, arguing that Russian law does not allow state courts to limit the arbitral tribunal competence and rights of the parties to the arbitration, as well as to interfere in arbitration proceedings and stop the proceedings.<sup>63</sup> In another case, the court refused to prohibit a foreign company from initiating claims in state courts outside of Russia against a Russian debtor which was in the insolvency process in Russia. The court explained that it is not entitled to deprive the creditor of its right to defend its interests in any chosen way, including the claims to foreign state courts.<sup>64</sup>
41. However, the recently passed law<sup>65</sup> allows a party subject to foreign sanctions to apply to a Russian state court to restrain the counterparty from commencing or pursuing arbitration before a foreign arbitral tribunal. The state court may award damages (in the claimed amount and legal expenses) if the counterparty violates this prohibition. This applies to disputes with Russian or foreign entities and individuals subject to foreign sanctions or arising out of sanctions against Russian entities and individuals. This stems from the exclusive jurisdiction of Russian state courts over these disputes and the unenforceability of arbitration agreements set by the abovementioned law. These rules do not affect the recognition and enforcement of foreign arbitral awards if (i) the award was issued upon the claim of a party subject to foreign sanctions; or (ii) the party subject to foreign sanctions did not object to the foreign proceedings (including by way of the Russian court's prohibition to commence/pursue the foreign proceedings).

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<sup>62</sup> New horizons of international arbitration: a collection of articles/A.V. Asoskov, F. Belo, N.G. Vilkoval et al.; ed. A.V. Asoskov, N.G. Vilkoval, R.M. Khodykin. M.: Infotropic Media, 2013. Issue. 1. P. 384; Khodykin R.M. Anti-suit interim measures in the civil process and international arbitration//Issues of international private, comparative and civil law, international commercial arbitration: LIBER AMICORUM/ed. S.N. Lebedev, E.V. Kabatova, A.I. Muranov, E.V. Vershinin. M.: Statute, 2013. P. 382.

<sup>63</sup> Ruling of the Federal Arbitration Court of the North-Western District of 09.01.2003 N A56-30789/02; Ruling of the Third Arbitration Court of Appeal of 18.03.2011 in the case N A33-17978/2010; Ruling of the Seventh Arbitration Court of Appeal of 04.21.2016 N 07АП-2178/2016 in the case N A03-547/2016.

<sup>64</sup> Ruling of the Federal Arbitration Court of the Far Eastern District of 20.06.2000 N Ф03-А51/00-1/993.

<sup>65</sup> Federal Law of 08.06.2020 No. 171-FZ "On Amendments to the Code of Arbitration Procedure of the Russian Federation in order to protect the rights of individuals and companies in connection with restrictive measures introduced by a foreign state, association of states and/or union and/or a state (interstate) institution of a foreign state or an association of states or a union of states". For the full text of this section, please click the link here: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_354472/](http://www.consultant.ru/document/cons_doc_LAW_354472/).

**6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

42. Russian insolvency law provides for general grounds to challenge the transactions executed prior to opening the insolvency proceedings to the detriment of the debtor and giving preference to one of the creditors.<sup>66</sup> This can be done by a claim of the insolvency administrator only in state court.<sup>67</sup> This can also be done by a claim of the creditor in state court (*NB*: not in the insolvency proceedings, but in the ordinary claim procedure in state court) or in arbitration if the contract provides for arbitration.<sup>68</sup> However, Russian law does not provide for specific grounds for challenging the contracts containing arbitration agreements, in particular by the insolvency administrator or the insolvency court.
43. Separately, the insolvency administrator may try to challenge the respective contract on behalf of the debtor based on general civil law grounds on invalid and void transaction. The insolvency administrator shall submit such a claim to arbitration since there are no provisions in Russian insolvency law providing for the state court mandatory jurisdiction (insolvency or otherwise) if the claimant is in the process of insolvency—see paragraph 8.
44. Please also note that, according to the court practice, the disputes concerning the validity of transactions arising out of special provisions of the Russian insolvency legislation involving banks where provisional administration (rehabilitation) has been introduced in respect of a bank, but where no insolvency proceedings have commenced yet, are not arbitrable—please refer to paragraph 12.

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

45. Under Russian law, the arbitration agreement is autonomous. An arbitration clause should be interpreted as an agreement independent from other terms of the contract.<sup>69</sup> According

<sup>66</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 61.1(1), 61.2(1), 61.2(2), and 61.3.

<sup>67</sup> Please note that Russian law provides for different types of administrators in relation to the debtor depending on the stage of the insolvency proceedings. With certain exceptions, their rights and responsibilities are similar. Given this, we refer to the insolvency administrator in general, irrespective of the differences between them.

<sup>68</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 61.8 and 61.9.

<sup>69</sup> Law of the Russian Federation of 07.07.1993 N 5338-1 “On international commercial arbitration”, art 16(1). For the full text of this section, please click the link

here: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_2303/4b3c68a9db1c535c10559c3236fb61dc494f8dbf](http://www.consultant.ru/document/cons_doc_LAW_2303/4b3c68a9db1c535c10559c3236fb61dc494f8dbf); Federal Law of 29.12.2015 N 382-FZ “On Arbitration in the Russian Federation”, art 16(1). For the full text of this section, please click the link here: [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_191301/64c6dc0da9f5c64fcbb40da8edec90e2b5aac70a](http://www.consultant.ru/document/cons_doc_LAW_191301/64c6dc0da9f5c64fcbb40da8edec90e2b5aac70a).

to the court practice, the validity of the arbitration clause does not depend on the validity of the main contract.<sup>70</sup>

**8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?**

46. Russian law does not provide for such rights of the insolvency administrator or the insolvency court. The insolvency administrator shall represent the debtor in the pending arbitration, and it can raise arguments as to why the arbitration shall be terminated or suspended, including *inter alia* the arguments as to the enforceability of the future arbitral award and the *vis attractiva concursus* rule. However unless the other party agrees to terminate/suspend, the discretion whether to proceed with the arbitration or not is with the arbitral tribunal.

**9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?**

**a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**

**b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

47. Russian law does not require and does not allow a creditor to take any formal step in the insolvency proceedings to be able to commence or continue with the arbitration. The claimant may either terminate the arbitration and instead raise its claim in the insolvency proceedings or continue with arbitration. The associated consequences and risks are discussed in paragraphs 18 and 26. The court is not allowed to either authorize commencement or continuation of the arbitration or order the opposite.

48. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, then either the creditor, following the *vis attractiva concursus* rule, submits its claim to the insolvency proceedings and the claim is heard on the merits there, or the claimant proceeds with the arbitration and then tries to enforce it through state court. The associated consequences and risks are discussed in paragraphs 18 and 26.

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<sup>70</sup> Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 25.02.2014 N 165, para 12.

49. As to a waiver of the arbitration agreement, the general rule under Russian law is that a party to a litigation can ask to terminate the court proceedings based on the fact there is an arbitration agreement in place up until the decision of the first instance court has been rendered.<sup>71</sup> An objection to the hearing of a dispute in a state court shall be made by the party no later than the day of submitting its first statement on the merits of the dispute in the state court of first instance.<sup>72</sup> Otherwise, the parties are deemed to have consented to the jurisdiction of the state court notwithstanding the arbitration agreement in place. However, this does not mean a waiver of the arbitration agreement in general but rather for a particular dispute considered by the state court.<sup>73</sup>

**10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?**

50. Russian law does not prohibit the insolvency administrator from challenging in arbitration the contracts which include an arbitration agreement. In such case, the insolvency administrator is acting on behalf of and protecting the interests of the debtor. However, under Russian law, applications for challenging transactions on the specific grounds provided by the insolvency laws shall be submitted to the state court.<sup>74</sup> This is based on the approach that in such case, the insolvency administrator is acting on behalf of the creditors of the insolvent debtor and thus is not bound by the arbitration agreement rather; according to the insolvency laws, the claim shall be filed to the state court.<sup>75</sup> Having said that, one can note that the referenced court decisions relate only to the receivership stage of the insolvency proceedings.
51. Please also note that, according to the court practice, the disputes challenging transactions arising out of special provisions of the Russian insolvency legislation involving banks where provisional administration (rehabilitation) has been introduced in respect of a bank, but where no insolvency proceedings have commenced yet, are not arbitrable—please refer to paragraph 12.

<sup>71</sup> Code of Arbitration Procedure of the Russian Federation of 24.07.2002 N 95-FZ, art 4(6).

<sup>72</sup> *ibid*, art 148(1)(5).

<sup>73</sup> Resolution of the Plenum of the Supreme Court of the Russian Federation of 10.12.2019 N 53, para 16; Ruling of the Supreme Court of the Russian Federation of 08.02.2016 N 306-ЭC15-13927 in the case N A57-16403/2014; Ruling of the Tenth Arbitration Court of Appeal of 25.02.2019 in case N A41-69761/18.

<sup>74</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 61.1(4); Ruling of the Arbitration court of the Ural district of 04.10.2015 N Ф09-2832/14 in the case of N A47-6500/2013.

<sup>75</sup> Ruling of the Ninth Arbitration Court of Appeal of 19.11. 2012 N 09АП-31889/2012 in the case N A40-31270/07-36-79Б; Ruling of the Ninth Arbitration Court of Appeal of 21.12.2012 N 09АП-38027/2012 in the case N A40-41119/ 11-70-196B.

**11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?**

52. Russian law does not directly permit or prohibit insolvency administrators to conclude new arbitration agreements. An insolvency administrator shall act reasonably, in good faith, and in the interests of the debtor and creditors.<sup>76</sup> Therefore, the insolvency administrator is free to enter into arbitration agreements. We are aware of one court decision confirming such approach.<sup>77</sup>
53. However, arbitration is usually considered by state courts to be more expensive than litigation. In addition, arbitration does not allow other insolvency creditors to participate in the proceedings. Based on this, Russian courts not rarely use the argument that arbitration agreement may infringe rights of other creditors in the insolvency proceedings.<sup>78</sup> Taking the above into account, concluding a new arbitration agreement may potentially be considered by the creditors and/or the court as inconsistent with the requirements of insolvency administration.

**12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?**

54. Under Russian law, the debtor, insolvency creditors, and authorized bodies (Federal Tax Service of the Russian Federation, relevant executive authorities of the constituent entities of the Russian Federation, and local government bodies)<sup>79</sup> are entitled to conclude a settlement agreement at any stage of insolvency proceedings.<sup>80</sup> It is subject to approval by the state court.<sup>81</sup> The settlement agreement entails termination of the bankruptcy proceedings. If the settlement is reached during the receivership stage, the preceding court decision declaring the debtor bankrupt and opening receivership proceedings becomes unenforceable.<sup>82</sup>
55. If insolvency proceedings are terminated and do not result in the liquidation of a company, an arbitration agreement and arbitral award become enforceable again, suspended arbitrations can be resumed, and new arbitrations can be initiated.<sup>83</sup> According to the court practice, if insolvency proceedings are terminated due to the approval of a settlement agreement and a claim was not heard on the merits in the bankruptcy case, the state court (which suspended

<sup>76</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 20.3(4).

<sup>77</sup> Ruling of the Second Arbitration Court of Appeal dated 22.12.2009 in the case N A29-1520/2007.

<sup>78</sup> Ruling of the Arbitration Court of the West Siberian District of 23.03.2017 N Ф04-775/2017 in the case N A81-4101/2016.

<sup>79</sup> Federal Law of 26.10.2002 N 127-FZ "On insolvency (bankruptcy)", art 2.

<sup>80</sup> *ibid*, art 150(1).

<sup>81</sup> *ibid*, art 150(4).

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid*, art 57(2); Karabelnikov, B.R. Enforcement and contestation of decisions of international commercial arbitration. Commentary on the 1958 New York Convention and Code of Arbitration Procedure Code of the Russian Federation of 2002. 3rd ed., Revised. and add. M.: Statute, 2008. P. 606, chps 30 and 31.

the proceedings on that claim in order to transfer it to the bankruptcy case—see paragraph 5 on this) shall resume the proceedings and continue hearing the case at its own initiative or at the request of any person involved in the case.<sup>84</sup> If the claim was heard on the merits in the bankruptcy case, it should not be considered by a state court again.<sup>85</sup> According to court practice, this applies to arbitration, as well. Therefore, as soon as the settlement agreement has been agreed and approved by the state court, insolvency does not affect arbitration unless the claim was heard on the merits in the bankruptcy case.

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?**

56. The rules regulating the effects of insolvency are mandatory and cannot be changed by the parties.<sup>86</sup> According to the Constitutional Court of the Russian Federation, insolvency proceedings aim “to protect both private and public interests”.<sup>87</sup> In order to do that, the Constitutional Court of the Russian Federation states the balance of the rights and legitimate interests of different parties shall be determined in the course of the insolvency proceedings, and it shall be made in a compulsory way.<sup>88</sup>

**14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?**

57. It is the arbitrators’ discretion whether to proceed with the arbitration or not given the consequences and risks discussed in paragraphs 18 and 26.

**15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?**

58. Irrespective of the place of registration or business of the creditors, the insolvency proceedings are concentrated before one state commercial court at the location of the debtor (see paragraph 3 above). Thus, the place of registration or business of the creditors does not affect the effectiveness of the insolvency court’s position on the arbitration.

<sup>84</sup> Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated 22.06.2012 N 35, para 28.

<sup>85</sup> *ibid.*

<sup>86</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 1(3).

<sup>87</sup> Ruling of the Constitutional Court of the Russian Federation of 19.12.2005 N 12-П.

<sup>88</sup> Ruling of the Constitutional Court of the Russian Federation of 22.07.2002 N 14-П.

**Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings**

**16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?**

**a. If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]**

59. The position depends on the stage of the insolvency proceedings. In all cases, the insolvent party will remain the party to the arbitration, while the insolvency administrator will represent the party if the insolvency proceedings reach receivership stage.

**17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?**

60. Russian law does not contain a specific provision on the effect of insolvency on arbitration. As the result, general provisions of the arbitration law that entitle parties to agree to arbitration and the respective procedure (including confidentiality and restrictions on access of third parties) continue to apply. As a matter of practice, the insolvency administrator is required to report to the creditors and the court on the status of arbitration as part of his periodic reports on the status of the insolvency process.

**18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?**

61. No, the name of the party remains the same.

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

62. The insolvency administrator is empowered to reach a settlement agreement in arbitration once the administrator takes control over the insolvent company's management in the

receivership stage of the insolvency and does not require an approval by the court. The debtor in possession (ie, a company during the monitoring stage of the insolvency proceedings) does not require approval of the court but may require the approval of the insolvency administrator.

**20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?**

63. There is no express provision in Russian law on this issue. Importantly, Russian law does not allow for recognition and enforcement of interim measures ordered by an arbitral tribunal. As a result, the issue of the effect of interim measures ordered by an arbitral tribunal in insolvency has not arisen. For interim measures ordered by a Russian state court, Russian law provides for the lifting of any arrest of assets after commencement of the receivership stage of the insolvency;<sup>89</sup> the rule is likely to apply by analogy to arbitration.

**21. Does the opening of insolvency proceedings in the Russian Federation affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?**

64. Russian law does not deal expressly with this issue. Once receivership commences, any arrest of assets is likely to be considered lifted, applying by analogy the rule applicable to interim measures ordered by state courts.

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?**

65. Russian law and court practice do not restrict the capacity of the insolvent party to settle the dispute in the arbitration; however, depending on the stage of the insolvency proceedings, the insolvent party would be represented by its management (monitoring stage) or the insolvency administrator (receivership stage).

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<sup>89</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 136.

### **Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings**

**23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?**

66. Once the insolvency process commences (with the monitoring stage), any subsequent enforcement action must be pursued within the framework of the insolvency proceedings—see paragraphs 17-32.

**24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?**

67. As explained in more detail in paragraph 23 above, until the claim is filed with the court dealing with the insolvency process, the claim has no status in that process. It may be filed in the insolvency process either as a standalone claim (subject to rules applicable to any other claims) or based on the arbitral award (in which case the rules on recognition and enforcement of the award will be applied by the court).

**25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?**

68. The award will need to be recognized in order to serve as a proof of credit for the purposes of the insolvency process. As explained in paragraph 23 above, the claim based on an arbitration award must be filed with the court supervising the insolvency process; the court will consider the claim applying the New York Convention or domestic law, depending on whether the award is foreign or domestic.

**26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?**

69. Russian courts apply the notion of public policy very broadly, frequently conflating it with arbitrability, so all or most rules are likely to be treated as issues of public policy. For instance, non-arbitrability of certain claims,<sup>90</sup> giving preference to one of the creditors,<sup>91</sup> or inability of

<sup>90</sup> Ruling of the Supreme Court of the Russian Federation of 16.08.2016 N 305-ЭС16-4051.

<sup>91</sup> Ruling of the Arbitration Court of the Moscow District of 25.04.2018 in the case N A40-176466/17.

other creditors to participate in the arbitration that may affect their rights<sup>92</sup> have been held to lead to a breach of public policy.

**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?**

70. There are no express provisions in the law and only limited practice on the issue. As explained above, the creditors are allowed to continue arbitrations initiated prior to the commencement of the insolvency process, hence one can argue that the principle of procedural equal treatment does not form part of the Russian public policy. The Russian courts have treated substantive equal treatment as part of the Russian public policy. For example, recognition of an ICC award was refused on the basis that it provided for payment of the entire amount due to the creditor while the claims of the other creditors had been subject to a haircut and deferral as part of a settlement reached in the course of the Russian insolvency proceedings.<sup>93</sup>

**28. Are there any other provisions or case law of the Russian Federation concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?**

71. No.

## IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in the Russian Federation concerning the insolvent party.]

**29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in the Russian Federation?**

72. The Russian insolvency law requires prior recognition by a competent Russian court (on application of an interested party) for foreign insolvency proceedings to be given effect in Russia<sup>94</sup> (although, see paragraph 76 below). The law conditions recognition of foreign insolvency on existence of a treaty providing for recognition and enforcement of foreign

<sup>92</sup> Ruling of the Arbitration Court of the West Siberian District of 09.07.2018 N Ф04-2440/2018 in the case N A27-10847/2017.

<sup>93</sup> Ruling of the Arbitration Court of the Moscow District of 25.04.2018 in the case N A40-176466/17.

<sup>94</sup> Federal Law of 26.10.2002 N 127-FZ “On insolvency (bankruptcy)”, art 1(6).

judgments or reciprocity, with the Russian courts usually applying a strict standard and requiring evidence of actual recognition of Russian insolvencies in the respective state,<sup>95</sup> though in some cases, a foreign insolvency was recognized based on the foreign law providing for recognition of Russian insolvency in principle.<sup>96</sup>

**30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?**

73. No, the Russian Federation has not adopted the UNCITRAL Model Law or, indeed, any detailed regulations on cross-border insolvencies.

**31. Does the opening of insolvency proceedings outside of the territory of the Russian Federation produce any effect on arbitrations seated in the jurisdiction? What is the source of the rule or legislation providing for such effects?**

74. There are no express provisions or authoritative guidance from the courts on the issues. The arbitrators will have to decide whether the foreign insolvency affects their jurisdiction or capacity of one of the parties. However, the tribunal's failure to give effect to the restrictions imposed by the foreign insolvency proceedings may be deemed to give rise to a public policy issue under Russian law (see paragraph 76 below).

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

75. There are no provisions in the law on this issue. The provisions dealing with recognition and enforcement of foreign insolvencies apply expressly to proceedings before state courts only, thus one may argue that arbitrators are free to give effect to a foreign insolvency, even if it was not recognized in the Russian Federation.

**33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?**

76. There are no rules expressly requiring arbitral tribunals to apply or comply with the rules governing foreign insolvency proceedings. However, the courts have recently refused

<sup>95</sup> Ruling of the Arbitration Court of the Moscow District of 02.09.2019 in the case N A40-101054/2019; Ruling of the Arbitration Court of the Ural District of 09.10.2019 No. Ф09-6266/19 in the case N A60-29115/2019.

<sup>96</sup> Ruling of the Arbitration Court of Saint Petersburg of 22.06.2006 in the case N A56-56528/2005.

enforcement of a LCIA award against subsidiaries of a Swiss company that was subject to an insolvency process on the ground that the enforcement would violate public policy—provisions of Swiss insolvency law requiring substantive equal treatment of creditors.<sup>97</sup>

**34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?**

77. The award that does not comply with the requirements of Russian insolvency law will be set aside on public policy grounds (see paragraph 66 for examples). There is only limited practice on the issue of the effect of non-compliance with foreign insolvency law rules, but there has been an example of arbitral award being denied enforcement on this ground (see paragraph 76 above).

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?**

78. No.

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<sup>97</sup> Ruling of the Arbitration Court of the Moscow District of 04.03.2020 in the case N A40-30440/2019 No. 005-386/2020.