

# COVID-19: Insolvency Filing Moratorium in Russia

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The Russian Government has introduced a moratorium on the filing of insolvency claims (the “moratorium”)<sup>1</sup> from 6 April through 6 October 2020. This will have important legal consequences both for the persons covered by it (“protected debtors”) and for those with whom they do business. The moratorium imposes restrictions on transactions made by protected debtors. It also establishes certain measures that may help restore the financial position of protected debtors, where this has been adversely affected by the consequences of the spread of the coronavirus infection (the “consequences of the pandemic”).

This review contains an analysis of the most significant effects of the moratorium, as well as some practical advice regarding the execution of transactions in these circumstances.

## I. Personal scope of application

Pursuant to the Insolvency Law and Decree No. 428, the moratorium will apply to a person if that person’s main commercial activity is specified in the list of industries most affected by the consequences of the pandemic (the “industry list”),<sup>2</sup> or if the company is included in the lists of companies systemically important for the national economy or of strategic enterprises.<sup>3</sup>

For a significant number of persons there is uncertainty as to whether their formal compliance with these requirements is sufficient for them to be covered by the moratorium. In particular, the moratorium rules do not

<sup>1</sup> The moratorium on the filing of insolvency claims was introduced by Decree No. 428 of the Russian Government dated 3 April 2020 (“Decree No. 428”) on the basis of new Article 9.1 of Federal Law No. 127-FZ dated 26 October 2002 “On Insolvency (Bankruptcy)” (the “Insolvency Law”) enacted by Federal Law No. 98-FZ dated 1 April 2020. Although Article 9.1 of the Insolvency Law allows for imposition of the moratorium where the ruble exchange rate materially changes, Decree No. 428 does not refer to such legal grounds, and there is no reason to regard the recent change of the ruble rate as material. Therefore, persons whose financial position was affected by the fall of the ruble rate should not be covered by the moratorium on such grounds.

<sup>2</sup> See on the website of the Federal Tax Service a service that allows to check whether a person is covered by the moratorium (URL: <https://service.nalog.ru/covid/>).

<sup>3</sup> The list of companies systemically important for the national economy was approved by Minutes No. 3 of the meeting of the Government Commission for Sustainable Development of the Russian Economy dated 20 March 2020; Decree No. 1009 of the Russian President dated 4 August 2004 “On Approval of the List of Strategic Enterprises and Strategic Joint-Stock Companies”; Directive No. 1226-r of the Russian Government dated 20 August 2009 “On Approval of the List of Strategic Enterprises and Federal Executive Authorities in Charge of Implementation of Uniform State Policy in Industries Where Such Enterprises Operate.”

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expressly state whether these persons need to have (1) been affected by the consequences of the pandemic; (2) had signs of insolvency; **and** (3) carried out their main commercial activity in an industry included in the industry list or have been included in another relevant list (together, the “essential criteria”).

The moratorium imposed by Decree No. 428 appears to apply either in the event of a person’s engagement in activities included in the industry list or from their inclusion in other relevant lists. In our view, however, by implication of Article 9.1 of the Insolvency Law, such persons must also actually have been adversely affected by the consequences of the pandemic. In addition, Article 9.1 of the Insolvency Law describes the persons covered by the moratorium as debtors. This allows for the interpretation that they must meet the definition of the term “debtor” in Article 2 of the Insolvency Law.

If a person does not meet the essential criteria, then the limitations established by the moratorium on creditor rights, for example, on the imposition of financial penalties, and on the rights of persons included in the lists, such as the right to the payment of dividends or to engage in certain transactions, appear to be unjustified and contrary to the purposes of the moratorium.<sup>4</sup>

Therefore, it appears that the application of the moratorium should be determined on the basis of the essential criteria and not just the formal criteria. The additional factors set out below should also be considered, where relevant.

- If a person appears in the industry list or in another relevant list and a dispute arises as to whether the moratorium applies to that person, its conformity with the essential criteria must be subject to a court review (see Section III below).
- The Insolvency Law sets out more stringent criteria to determine whether strategic enterprises and organisations are showing signs of insolvency.<sup>5</sup> The total amount claimed from them must be at least 1,000,000 instead of 300,000 rubles, and the strategic enterprise or organization must be unable to meet its monetary obligations for a period longer than six months, instead of the three months envisaged by the general rule.<sup>6</sup>
- If a person’s main commercial activity appears on the industry list, there may be a rebuttable presumption that such person actually carries out its main commercial activity in an industry affected by the pandemic and has suffered from the consequences of the pandemic. The creditor(s) would then bear the burden of rebutting this presumption. The court will decide whether such person meets the insolvency criteria on the basis of the general rules of evidence.

Application of the essential criteria would mean that the moratorium would not cover a person included in the industry list, but which, for example:

- had signs of insolvency long before the moratorium was imposed,
- was not actually engaged in said industry activity,
- said industry activity was not its main activity, or
- did not suffer from the consequences of the pandemic (for example, if it was able to effectively organise online sales or quickly re-configure production).

Nevertheless, we cannot exclude the possibility that a person, who is commercially interested in being covered by the moratorium, may attempt to create an artificial situation, in which it will appear to have the required signs of insolvency, or may change its main commercial activity to one that is specified in the industry

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<sup>4</sup> Clause 3 of Article 55 of the Russian Constitution. The Russian Constitutional Court clarified that “since a moratorium means public interference in the private law relations, legal regulation of the relations affected by its imposition... should be based on the general law principle of commensurability and proportionality of the imposed restrictions”, meet the requirements of justice, and take into account the balance of interests of the parties to legal relations (section 5 of Resolution No. 10-П of the Russian Constitutional Court dated 3 July 2001).

<sup>5</sup> Since, unlike with strategic enterprises and organizations, the Insolvency Law does not prescribe any special regulation for companies systemically important for the national economy, the latter should be subject to the general insolvency criteria, unless otherwise provided for by the law (e.g. if an organization is a natural monopoly or a financial institution).

<sup>6</sup> Insolvency Law, clauses 3 and 4 of Article 190.

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list. In such circumstances, where a debtor has taken advantage of the protection of the moratorium in bad faith, it appears important (by reference to the abuse of rights concept in existing court practice) that creditors should have the opportunity to challenge the presumption that the debtor is protected by the moratorium.<sup>7</sup>

### **Debtor's right to waive the benefit of the moratorium**

The Insolvency Law temporarily suspends the protected debtor's obligation to file an insolvency petition and limits the rights of other persons to file insolvency claims in respect of the protected debtor during the moratorium period. At the same time, the protected debtor retains the right to file such a petition. Therefore, a protected debtor can voluntarily waive the benefit of the moratorium by filing an insolvency petition.

However, the Insolvency Law does not expressly allow a protected debtor to waive the benefit of the moratorium in any other way, for example by way of a public announcement. It would appear that if a dispute were to arise as to the validity of such a waiver, the courts should recognize the protected debtor's right to such waiver, because the moratorium might make the protected debtor's financial position worse rather than better, for instance, in a situation in which such person is unable to sell its property at a profit in order to settle with its creditors.

The protected debtor may also need to waive the benefit of the moratorium if it has to make regular transactions for the sale of products and the value of these transactions exceeds one percent of the value of the debtor's assets. This is because such transactions will be held to be null and void in the event of the protected debtor's insolvency, provided that insolvency proceedings are initiated against the debtor after the termination of the moratorium (see Section IV.2 below).

It seems doubtful that a protected debtor would be permitted to waive the benefit of the moratorium for the benefit of certain creditors if the rights of other creditors would be violated by such waiver, for example in connection with the different methods of the accrual of interest on the liabilities of the protected debtor under Article 9.1 of the Insolvency Law (see Section IV.4 below).

## **II. Application of the moratorium to claims**

The moratorium applies to all claims which arose before it was introduced.

It is not clear, from Article 9.1 of the Insolvency law, whether claims arising after the moratorium has been introduced ("post-moratorium claims") are covered by it. Under this Article, enforcement proceedings in respect of post-moratorium claims are not stayed.<sup>8</sup> On the one hand, this principle can be construed broadly and generally excludes the application of the moratorium regime as a whole to new claims. On the other hand, it is possible that the courts will interpret this principle literally and, in the absence of a direct indication to the contrary, extend this rule not only to enforcement proceedings, but also to other legal relationships affected by the moratorium.

The Insolvency Law does not contain a definition of which claims are deemed to be post-moratorium claims. In our opinion, by analogy, the criteria used for differentiating between current settlements and registered claims should apply in this case.<sup>9</sup>

The moratorium provisions do not modify the case law of the Russian Federation Supreme Court ("Russian SC") regarding the subordination of debtors' affiliates' claims. In light of this, claims of such affiliates that arise from financing made following the introduction of the moratorium may still be subordinated in the event of insolvency.<sup>10</sup>

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<sup>7</sup> For this purpose, creditors may refer to the position of the RF Supreme Commercial Court ("Russian SCC"), which entitles the courts, by virtue of Article 10 of the RF Civil Code ("Russian Civil Code"), to cease insolvency proceedings if the debtor is found to be still solvent at the time of such proceedings and if it is in the interests of the creditors (section 10 of Resolution No. 88 of the Plenum of the Russian SCC dated 6 December 2013).

<sup>8</sup> Insolvency Law, subclause 4 of clause 3 of Article 9.1.

<sup>9</sup> Resolution No. 63 of the Russian SCC Plenum dated 23 July 2009.

<sup>10</sup> Section 3 of the Review of Court Practice for Resolution of Disputes Related to Establishment of Requirements to a Debtor's Controlling Persons and Affiliates in Insolvency Proceedings" approved by the Presidium of the Russian SC on 29 January 2020.

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### III. Procedural consequences of the moratorium

The moratorium does not prevent the creditors of a protected debtor from filing property claims in ordinary proceedings, or from petitioning for interim relief against the debtor, for example, to seize property and moneys in the accounts of the protected debtor.<sup>11</sup>

The Insolvency Law does not contain any grounds for prohibiting the commencement of new enforcement proceedings during the moratorium period, based both on pre- and post-moratorium claims. As a consequence of one of the goals of the moratorium (namely, the introduction of restrictions on the disposal of assets by protected debtors), it seems that there is also nothing to prevent bailiffs from seizing the assets of the debtor pursuant to new enforcement proceedings. However, following the seizure of the debtor's assets, new enforcement proceedings as well as ongoing enforcement proceedings must be stayed by virtue of the restriction imposed by Article 9.1 of the Insolvency Law.<sup>12</sup>

The procedural consequences of the moratorium also include a ban on initiating insolvency proceedings against a protected debtor on the basis of petitions filed by creditors. Any creditors' petitions for the initiation of new insolvency proceedings, which are filed during the moratorium period, as well as pre-moratorium petitions that were not accepted by the commercial court by the date of the introduction of the moratorium, will be returned.<sup>13</sup> It seems that if a creditor has a petition returned by the court but does not agree that the moratorium should apply to the relevant debtor because such debtor did not suffer from the consequences of the pandemic, it may appeal this decision. In this appeal, the creditor would need to prove that the moratorium does not apply to the debtor in its insolvency petition.<sup>14</sup>

Article 9.1 of the Insolvency Law does not envisage any changes in respect of insolvency proceedings already commenced by the time of the imposition of the moratorium.

### IV. Substantive consequences of the moratorium

#### 1. General consequences

The introduction of the moratorium entails, without limitation, the following substantive legal consequences:

- pledged property cannot be foreclosed (including out of court);<sup>15</sup>
- the set-off of claims is not permitted;<sup>16</sup>
- requests by founders (participants) for the payment of the value of their share (participatory interest) in the debtor's assets in connection with the founders' (participants') exit from the debtor will not be granted; buybacks or the acquisition by the debtor of placed shares, or the payment of the actual value of the founders' share (participatory interest) is also prohibited;<sup>17</sup>
- the payment of dividends, income on shares (participatory interests), or distribution of profits among the founders (participants/ shareholders) of the debtor is prohibited;<sup>18</sup> and
- owners of protected debtors that are unitary enterprises cannot extract their assets.<sup>19</sup>

The rules relating to transactions entered into by a debtor in violation of prohibitions imposed as a result of a supervision procedure may apply, by analogy, in determining whether a protected debtor's transactions made in violation of the prohibitions imposed by subclause 2 of clause 3 of Article 9.1 of the Insolvency Law qualify

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<sup>11</sup> RF Commercial Procedure Code (Russian CPC), paragraph 1 of clause 1 of Article 91.

<sup>12</sup> Federal Law No. 229-FZ dated 2 October 2007 "On Enforcement Proceedings", subclause 5 of clause 1 of Article 40.

<sup>13</sup> Insolvency Law, clause 3 of Article 9.1.

<sup>14</sup> Russian CPC, clause 3 of Article 223.

<sup>15</sup> Insolvency Law, subclause 3 of clause 3 of Article 9.1

<sup>16</sup> *ibid*, subclause 2 of clause 3 of Article 9.1 and paragraph 7 of clause 1 of Article 63.

<sup>17</sup> *ibid*, subclause 2 of clause 3 of Article 9.1 and paragraph 5 of clause 1 of Article 63.

<sup>18</sup> *ibid*, subclause 2 of clause 3 of Article 9.1 and paragraph 9 of clause 1 of Article 63.

<sup>19</sup> *ibid*, subclause 2 of clause 3 of Article 9.1 and paragraph 8 of clause 1 of Article 63.

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as void or voidable. In this case, transactions aimed at the disposal of the debtor's assets should be held to be null and void,<sup>20</sup> whereas transactions involving a set-off should be held to be voidable.<sup>21</sup>

## **2. Challenges to transactions in event of the insolvency of a protected debtor**

Transactions made by protected debtors both before and after the imposition of the moratorium may be challenged under the Insolvency Law. They may be challenged in accordance with the provisions of Section III.1 of the Insolvency Law and subject to the specifics of calculating the hardening periods (see Section IV.3 below).

In addition, subclause 4 of clause 4 of Article 9.1 of the Insolvency Law provides that transactions for the transfer of assets, or the assumption of obligations or liabilities, by a debtor made during the moratorium period will be held to be null and void (provided that insolvency proceedings are initiated against the debtor within three months after the termination of the moratorium), if the value of assets transferred under a single transaction or a series of interrelated transactions, or the amount of the assumed obligations or liabilities, exceeds one percent of the value of the debtor's assets, and the transaction itself falls outside of the normal business of the debtor. This rule introduces additional grounds for challenging a protected debtor's transactions and contains a new legal framework, in which the invalidity of a transaction depends on an event that may occur in the future.

However, Article 9.1 of the Insolvency Law does not define whether such transactions of a protected debtor are conditionally void or conditionally valid, which results in uncertainty for counterparties to such a transaction. Nevertheless, taking into account the provisions of clause 1 of Article 167 of the Russian Civil Code concerning the invalidity of a transaction from the time of its execution, such transactions can reasonably be considered to be conditionally void.

The law leaves open the matter of whether the mechanisms, which are provided for by the Insolvency Law and have been developed by court practice, and which limit the availability of a defense against a challenge to a debtor's transactions, are applicable to the new grounds for challenging a protected debtor's transactions.<sup>22</sup> For example, the Insolvency Law imposes additional limitations on challenges to debtors' transactions if such challenges are not commercially viable.<sup>23</sup> It also imposes additional limitations in relation to transactions in which the debtor has received equivalent consideration and which are not intended to cause damage to the debtor's creditors.<sup>24</sup>

The potential for a protected debtor's transaction to be declared void means that counterparties to such transactions are vulnerable in the event of the subsequent insolvency of such protected debtor. This is because, in prevailing court practice, when a transaction is void, unlike a voidable one, this does not result in the restoration of the time limits for the inclusion of the creditor's claims under the void transaction in the register of creditors' claims after the deadline for filing such claims has elapsed.<sup>25</sup>

When applying the provisions of the Insolvency Law for the purposes of determining the range of transactions that may be recognised as void, it appears necessary to do so bearing in mind the purpose behind the introduction of the moratorium, namely, to restore the financial position of protected debtors and to prevent the dissipation of assets and the execution of transactions to the detriment of creditors. In light of this, it appears that such restrictions on challenges to transactions can also be applied by analogy in respect of a protected debtor's transactions.

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<sup>20</sup> Russian Civil Code, clause 1 of Article 174.1.

<sup>21</sup> Information Letter No. 129 of the Russian SCC Presidium dated 14 April 2009.

<sup>22</sup> Insolvency Law, clauses 1 and 4 of Article 61.4; Resolution No. 63 of the Russian SCC Plenum dated 23 December 2010, section 29.3.

<sup>23</sup> Insolvency Law, Article 61.7.

<sup>24</sup> *ibid*, clause 3 of Article 61.4.

<sup>25</sup> Resolution of the Commercial Court for the Volgo-Vyatsky Circuit No. Ф01-4321/2016, Ф01-4316/2016, Ф01-4320/2016 dated 6 December 2016 in case No. A43-7799/2013; Resolution of the Commercial Court for the East Siberia Circuit No. Ф02-5184/2014 dated 24 November 2014 in case No. A74-1639/2011; Resolution of the Commercial Court for the North-West Circuit No. Ф07-4938/2017 dated 29 May 2017 in case No. A56-49757/2011.

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It also appears that transactions aimed at the improvement of the protected debtor's position, such as the restructuring of outstanding loans, or attracting new financing, should not be held to be invalid, even though formally they may entail the assumption of new obligations by the protected debtor.

As to a ban on set-offs, it would be possible to use the approach of the Russian SC to challenges to transactions terminating parties' counter-obligations by way of set-off after a positive balance of such counter-obligations has been established in favor of the creditor.<sup>26</sup> The prevailing court practice proceeds from the fact that such transactions should not be held invalid, as they do not entail the preferential treatment of the creditor that is a counterparty to such a transaction.

### 3. Hardening periods: preferential and suspicious transactions

Article 9.1 of the Insolvency Law also sets out the specific process for calculating the timeframes available for challenging suspicious or potentially preferential transactions by a protected debtor.<sup>27</sup>

If insolvency proceedings are initiated against a protected debtor within three months after the moratorium is terminated, the period available for challenging the above transactions will be calculated as the sum of the following three periods:

- (a) the pre-commencement period: the challenge period for the relevant type of transaction under Articles 61.2 and 61.3 of the Insolvency Law, *i.e.* one month/ six months/ one year/ three years, as applicable;
- (b) the moratorium period: six months, unless the relevant period is extended by a decision of the Russian Government;<sup>28</sup> and
- (c) the post-moratorium period: the period prior to the initiation of the insolvency proceedings, but, in any case, no more than three months.

There is a provision of the new rules stating that the post-moratorium challenge period includes a period of up to one year from the termination of the moratorium. However, such period appears excessive,<sup>29</sup> as it is in any case limited to three months for the purposes of initiating insolvency proceedings against a protected debtor.<sup>30</sup>

### 4. Interest

Article 9.1 of the Insolvency Law sets out different procedures for calculating the accrual of penalties and interest on the use of funds during the moratorium period.

No forfeits (fines, penalties) or other financial sanctions for non-performance or improper performance will accrue on the obligations of protected debtors during moratorium period.<sup>31</sup> Interest will continue to accrue but will not be taken into consideration in the event that insolvency proceedings are initiated against the protected debtor within three months after the termination of the moratorium.<sup>32</sup>

The above limitations facilitate the maintenance of the protected debtors' financial position, but they can also adversely affect the interests of their creditors. This raises questions concerning the potential accrual of interest on protected debtors' obligations during the term of the moratorium.

Article 9.1 of the Insolvency Law does not expressly provide that moratorium interest should accrue during the moratorium period. However, we believe this would result in an equitable outcome, protecting the rights of creditors, who could themselves, among other things, have been affected by the consequences of the pandemic.

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<sup>26</sup> Ruling of the Russian SC No. 304-ЭС17-14946 dated 29 January 2018 in case No. A46-6454/2015; Ruling of the Russian SC No. 305-ЭС17-17564 dated 12 March 2018 in case No. A40-67546/2016; Ruling of the Russian SC No. 305-ЭС16-11128 dated 26 August 2019 in case No. A40-125232/2013.

<sup>27</sup> Insolvency Law, Articles 61.2 and 61.3.

<sup>28</sup> *ibid*, clause 1 of Article 9.1.

<sup>29</sup> *ibid*, subclause 1 of clause 4 of Article 9.1.

<sup>30</sup> *ibid*, clause 4 of Article 9.1.

<sup>31</sup> *ibid*, subclause 2 of clause 3 of Article 9.1., paragraph 10 of clause 1 of Article 63.

<sup>32</sup> *ibid*, subclause 2 of clause 4 of Article 9.1.



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In this case, the moratorium interest would serve as appropriate compensation to creditors for the prohibition on the imposition of forfeiture or other financial sanctions, and for their inability to register their interest in money accrued during the moratorium period in the protected debtor's register of creditors' claims.

The absence of an express provision concerning the accrual of moratorium interest during the moratorium period does not serve as a ground for arguing that such accrual is not permitted. The Plenum of the Russian SCC considered a similar situation in relation to the supervision procedure.<sup>33</sup> The SCC noted, by analogy to the relevant provisions of the Insolvency Law concerning creditor claims arising prior to the initiation of insolvency proceedings, that moratorium interest would accrue during the supervision procedure, instead of the interest and the financial sanctions payable under the relevant terms of the debtor's obligations. It should be noted that the relevant amendments, which expressly allow for the accrual of moratorium interest, were made in the Insolvency Law only a year after these explanations were given by the Russian SCC.<sup>34</sup>

We are of the opinion that similar rules are likely to apply to mandatory payments, except where the due dates of such payments have been extended by relevant acts of the Russian Government.<sup>35</sup>

It should also be noted that the Insolvency Law regulates severance payments and remuneration for employment in a similar manner.<sup>36</sup> Interest on claims for severance payments or remuneration will accrue during the term of the moratorium at the rate provided for by Article 236 of the RF Labor Code (*i.e.* no less than 1/150 of the key rate of the Bank of Russia on the overdue amounts for each day of the delay), provided that insolvency proceedings are initiated after the termination of the moratorium. The rights of creditors requiring a greater degree of protection, due to their significant social status, would otherwise be violated.

If the courts do recognise that moratorium interest may, in principal, accrue during the moratorium in the event of the subsequent insolvency of a protected debtor, another issue that will need to be resolved is the availability of moratorium interest, or other compensation for the loss of the opportunity to claim financial sanctions from protected debtors, in a situations in which insolvency proceedings are not initiated. We believe that this issue should be the subject of special legislative provision, especially regarding the claims of employees and in relation to mandatory payments.

## **5. Subsidiary liability**

The moratorium does not change the regimes of the subsidiary liability, corporate liability, or tortious liability<sup>37</sup> of controlling persons. An exception is subsidiary liability for the failure to file an insolvency petition when obliged to do so,<sup>38</sup> which does not apply during the moratorium period.<sup>39</sup>

## **6. Limitation periods**

The civil law provides that the imposition by the Russian Government of a moratorium on the performance of obligations suspends the limitation periods in respect of such obligations.<sup>40</sup>

It appears that the moratorium imposed by Decree No. 428 will not generally affect limitation periods in respect of creditors' claims against protected debtors. This is because the moratorium does not prevent creditors from filing claims against protected debtors outside of insolvency proceedings.

An exception to this general rule are creditors' claims that relate to protected debtor obligations, which cannot be performed while the moratorium is in effect. Such claims include, but are not limited to, the following:

- (a) claims for foreclosure on a protected debtor's pledged assets;

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<sup>33</sup> Resolution No. 88 of the Russian SCC Plenum dated 6 December 2013, section 4.

<sup>34</sup> Federal Law No. 482-FZ dated 29 December 2014 "On Amending Federal Law "On Insolvency (Bankruptcy)" and the Administrative Offence Code of the Russian Federation."

<sup>35</sup> Decree No. 409 of the Russian Government dated 2 April 2020.

<sup>36</sup> Insolvency Law, subclause 2 of clause 4 of Article 9.1.

<sup>37</sup> Ruling No. 305-3C18-15540 of the RF Supreme Court dated 5 March 2019.

<sup>38</sup> Insolvency Law, Article 61.12.

<sup>39</sup> *ibid*, subclause 1 of clause 3 of Article 9.1.

<sup>40</sup> Russian Civil Code, subclause 3 of clause 1 of Article 202.

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- (b) claims for the payment of any dividends that were announced but were not paid, income on shares (participatory interests), and the distribution of profits among the founders (participants/ shareholders) of a protected debtor; and
  - (c) claims by founders (participants) for the payment of the value of their share (participatory interest) in the debtor's assets in connection with the exit of such founders (participants); buybacks or the acquisition by the debtor of placed shares, or payment of the actual value of the founders' share (participatory interest).

It is our opinion that creditors will be able to avail of the stay on the limitation period in respect of such claims, provided that the other criteria for a stay are met.<sup>41</sup>

## V. Other effects

Aside from the specific and significant legal consequences of the moratorium considered in this review, there are also important changes concerning creditors' meetings held during the moratorium period, as well as the execution of settlement agreements in insolvency cases initiated within three months after the termination of the moratorium.

## VI. Extraterritorial operation of the moratorium

Foreign arbitral tribunals or courts adjudicating a dispute under Russian law are not bound by the procedural consequences of the moratorium. However, it is possible that they may apply some aspects of the moratorium that affect substantive relationships, such as the prohibition on the setting off of claims, where Russian law has been chosen as the law governing the rights and obligations of the protected debtor.

Regardless of whether the dispute is considered under Russian or foreign law, foreign arbitral tribunals or courts may regard the moratorium as a legally relevant fact, which amounts to, for example, force majeure or it becoming impossible to perform obligations, or which gives rise to a creditor's right to accelerate a loan.

## VII. Conflict between the moratorium and Russia's international obligations

The Russian Federation is a party to a number of international conventions that establish requirements for the recognition and enforcement of certain methods of securing the performance of obligations in contracting states. In particular, these include the Convention on International Interests in Mobile Equipment<sup>42</sup> ("Cape Town Convention") and the International Convention on Maritime Liens and Mortgages<sup>43</sup> ("Convention on Maritime Liens"). The Convention on Maritime Liens provides that registered encumbrances over maritime vessels (mortgages, liens or other encumbrances) are enforceable in member countries.<sup>44</sup>

Enforcement provisions in international conventions relating to injunctive relief (such as extrajudicial foreclosure of the pledged assets of a protected debtor) will prevail over the moratorium restrictions by virtue of the priority of international treaties over conflicting provisions in the Insolvency Law.<sup>45</sup>

At the same time, certain restrictions applicable during the moratorium do not conflict with the international conventions by virtue of the express provisions in the latter. It is therefore of interest to note the relationship between the provisions of the Insolvency Law that impose limitations upon protected debtors and those of the Cape Town Convention, which apply, in particular, to relationships between creditors (lessors) and debtors (lessees) in connection with the financing of the acquisition or leasing of aircraft in the air transportation sector, which has been heavily affected by the restrictions resulting from the spread of the coronavirus infection.

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<sup>41</sup> That the imposition of the moratorium falls within the last six months of the limitation period or, if the limitation period is less than six months, within the limitation period (Russian Civil Code, clause 2 of Article 202).

<sup>42</sup> Convention on International Interests in Mobile Equipment (signed in Cape Town on 16 November 2001).

<sup>43</sup> International Convention on Maritime Liens and Mortgages (signed in Geneva on 6 May 1993).

<sup>44</sup> Convention on Maritime Liens, Article 1.

<sup>45</sup> Insolvency Law, clause 4 of Article 1.



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Clause (a) of Article 30(3) of the Cape Town Convention provides that nothing in this Article affects “any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors”. Therefore, if insolvency proceedings are initiated in respect of a protected debtor within three months following the termination of the moratorium, the provisions of the Insolvency Law regarding the invalidation of protected debtor transactions will prevail over the provisions of the Cape Town Convention. In practical terms, this means that there is a risk that certain transactions will be challenged, where they relate to creditors’ use of the remedies offered by the Cape Town Convention against the protected debtor and its assets, such as foreclosure on pledged assets (including by way of retention).

## VIII. General conclusions and recommendations

Since there are certain gaps in the legal regulation of the moratorium, which may be closed by law-makers in the future, and since court practice for such matters is still to be developed, it will be necessary to negotiate such contractual clauses as would ensure the maximum protection of each parties’ interests – both those of the protected debtors and of their counterparties.

Counterparties should analyse contracts concluded with protected debtors to determine whether they may be invalidated, based on the provisions of clause 4 of Article 9.1 of the Insolvency Law.

We recommend that counterparties should obtain representations from persons that may potentially be covered by the moratorium and, where possible, from their controlling persons, to the effect that such person:

- is solvent, and has no signs of insolvency;
- undertakes not to take any actions aimed at creating situations whereby it would formally be covered by the moratorium;
- has not suffered from the consequences of the pandemic;
- to the extent allowed by the law, waives the benefit of the moratorium, in the event that the moratorium applies to them; and
- if applicable, represents and warrants that the transaction is made in its normal course of business and that the value of assets transferred under a single transaction or a series of interrelated transactions, or the amount of the assumed obligations or liabilities, does not exceed one percent of the value of the protected debtor’s assets.

When transacting with a protected debtor, it is advisable to obtain third-party security or to structure the transaction in such a way that the provider of security is not able to make use of the objections that could be raised by a protected debtor. For example, it would be prudent to obtain an independent guarantee or provide for independent liability of the surety for its failure to perform its obligations under a suretyship agreement.

Any persons who wish to avoid being covered by the moratorium should avoid situations that would result in them formally meeting the insolvency criteria.

In the event of a dispute, parties are recommended to obtain evidence so as to be able to prove that the debtor does not meet the essential criteria for being covered by the moratorium.

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