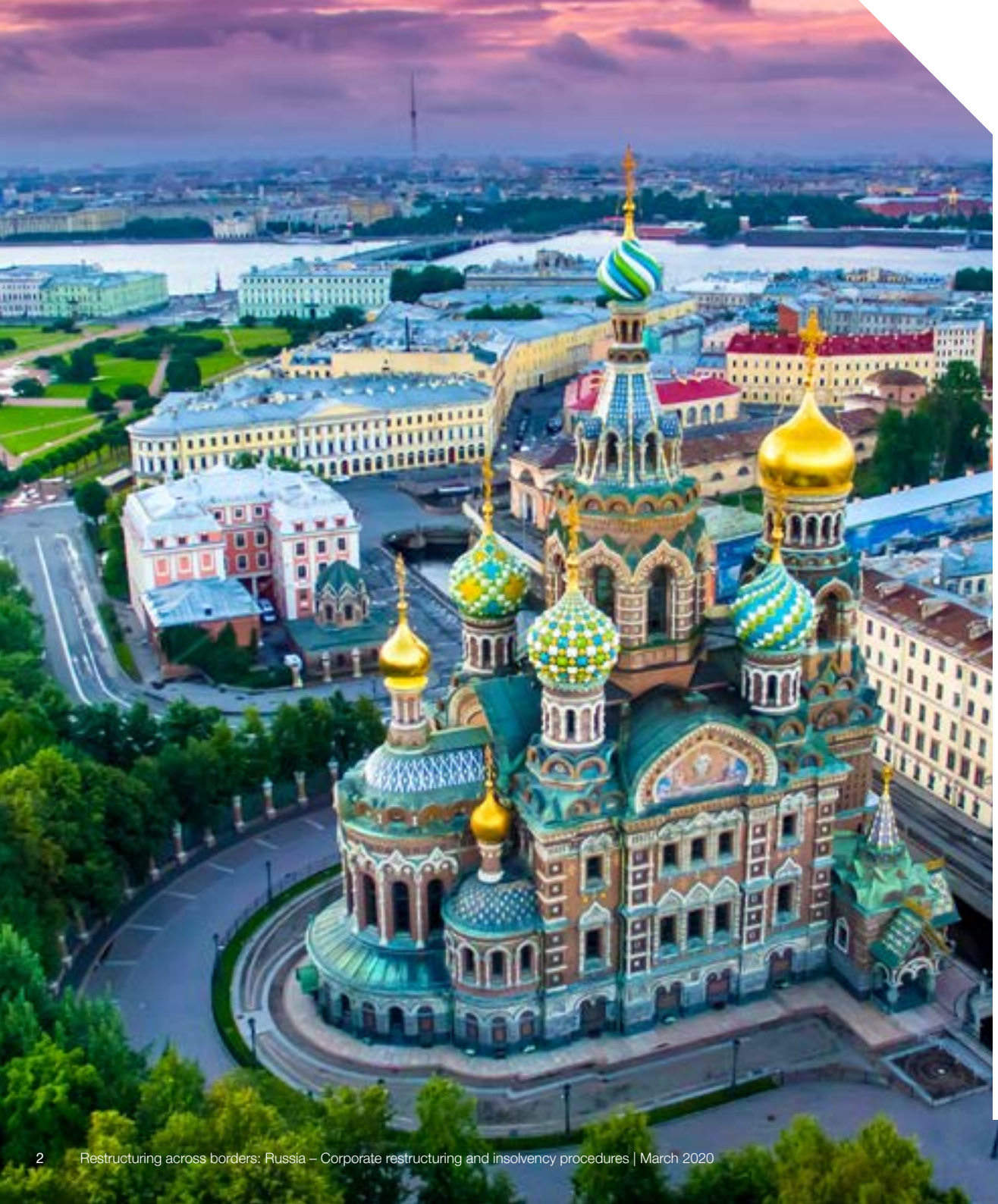
ALLEN & OVERY

Restructuring Across Borders

Russia:

Corporate restructuring and insolvency procedures | March 2020

allenovery.com



Contents

Introduction

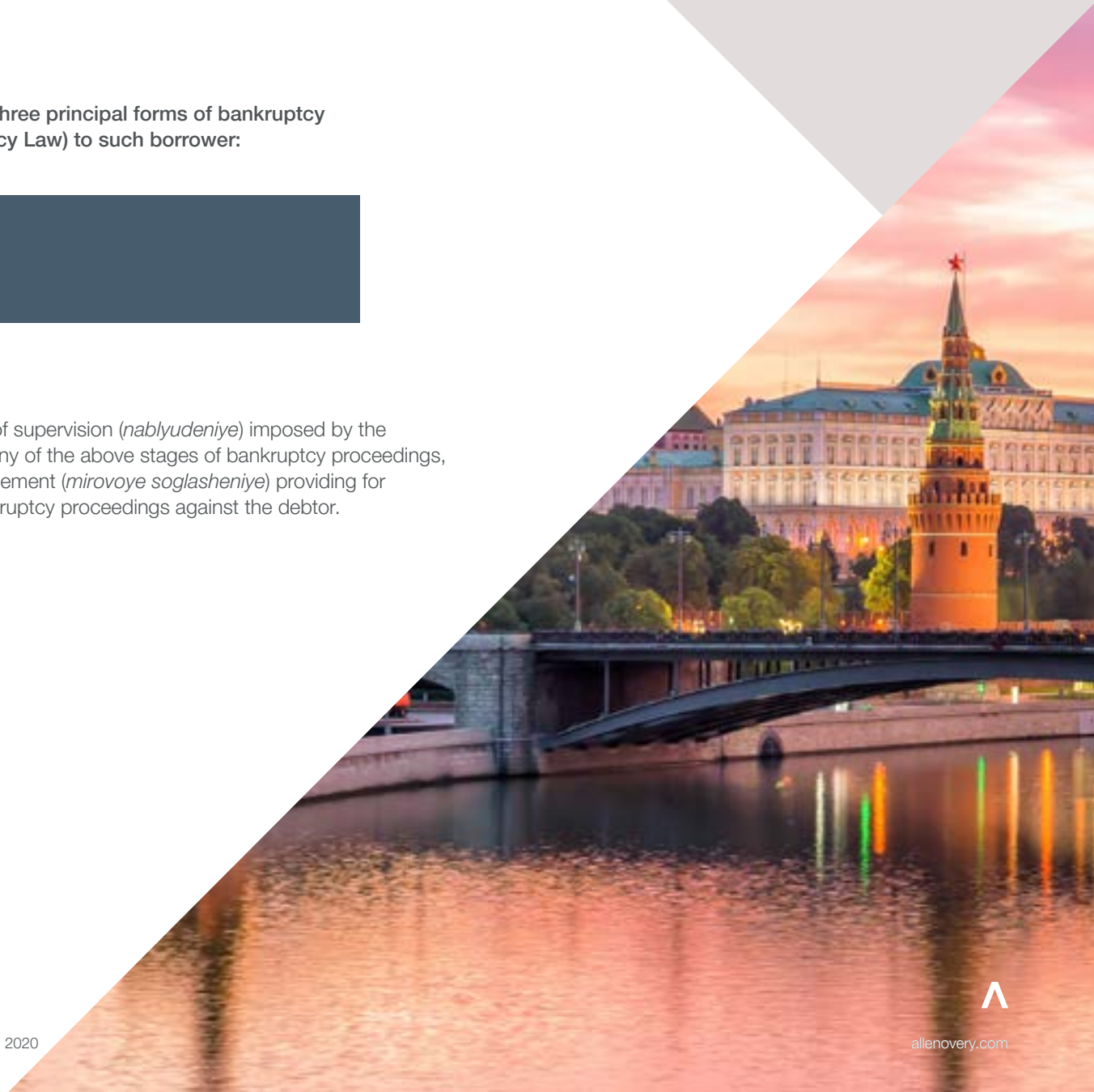
When a corporate borrower faces financial difficulties, there are three principal forms of bankruptcy procedures available under Russian insolvency law (the Insolvency Law) to such borrower:

– financial rehabilitation (*finansovoye ozdorovleniye*);

– external management (*vneshneye upravleniye*); and

– bankruptcy management (*konkursnoye proizvodstvo*).

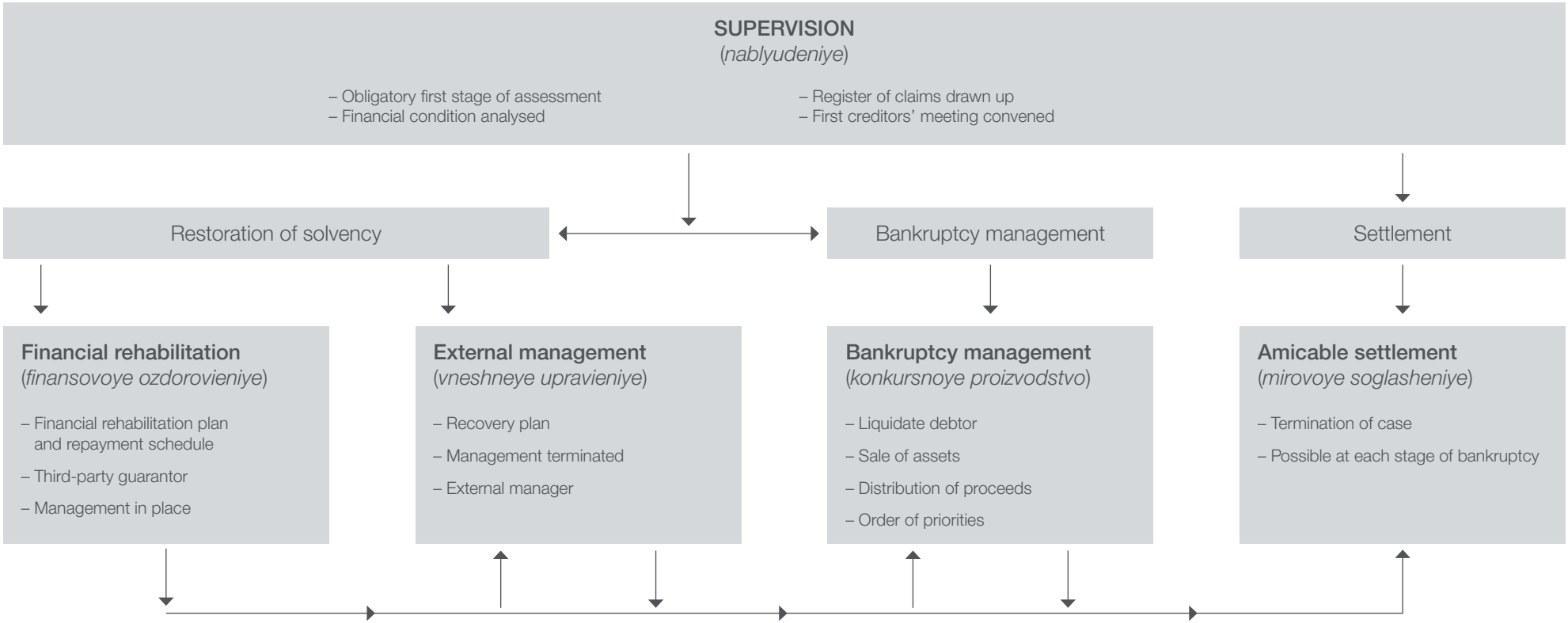
The above procedures are normally preceded by a mandatory stage of supervision (*nablyudeniye*) imposed by the arbitrazh court immediately after it accepts a bankruptcy petition. At any of the above stages of bankruptcy proceedings, the corporate debtor and its creditors may enter into an amicable settlement (*mirovoye soglasheniye*) providing for the settlement of the debtor's indebtedness and terminating any bankruptcy proceedings against the debtor.



Supervision

Supervision is the first bankruptcy stage for Russian corporate entities during which a court-appointed arbitration manager assesses the financial state of the debtor in order to determine whether restoration of the debtor's solvency is possible or whether bankruptcy management (winding-up) is the most appropriate outcome. If it becomes evident that there is no prospect of restoring the debtor's solvency, supervision can be immediately followed by bankruptcy management.

The maximum term of supervision is seven months, during which period the debtor's management remains in place but the arbitration manager's consent is required to enter into certain transactions (eg acquisition or disposal of assets, the value of which exceeds 5% of the balance sheet value of the debtor's assets, grant or receipt of loans or issue of guarantees). Any enforcement proceedings against the debtor are suspended. Creditors determine the next stage of bankruptcy proceedings but their decision must be approved by the court.



Financial rehabilitation

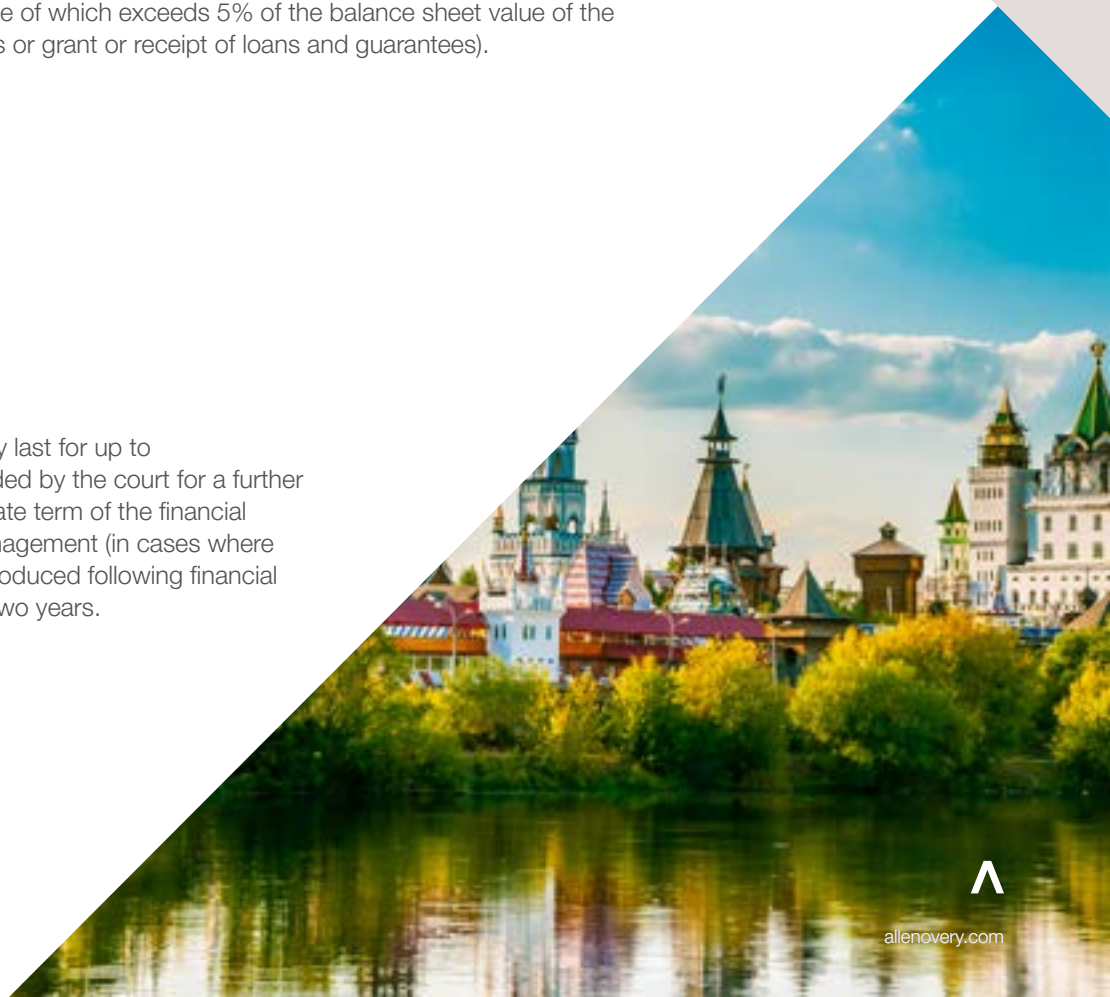
Financial rehabilitation is one of the two rescue measures available to restore the debtor's solvency. Its aim is to repay the debts in accordance with a financial rehabilitation plan and payment schedule approved by the majority of creditors present at the first creditors' meeting convened during the supervision stage. The Insolvency Law does not differentiate between classes of creditors, and the decision of the majority creditors binds the minority. Financial rehabilitation is conducted by an arbitration manager and its term cannot exceed two years. Any enforcement proceedings against the debtor are suspended and the creditors' claims may only be satisfied in the course of the bankruptcy proceedings.

The management bodies of the debtor remain in place but their activities are supervised by the arbitration manager. Certain types of transactions can be entered into only with the approval of the arbitration manager (their list is longer than the transactions required to be approved at the supervision stage and include the acquisition or disposal of any assets, except those in the ordinary course of business) or the general creditors' meeting (eg interested party transactions, acquisition or disposal of assets the value of which exceeds 5% of the balance sheet value of the debtor's assets or grant or receipt of loans and guarantees).

External management

External management is the other rescue measure available to restore the debtor's solvency. The rescue is contained in a recovery plan which is developed by the arbitration manager and approved by the majority vote of the creditors included in the claims register. The recovery plan is also required to be approved by the court.
The powers of the management bodies of the debtor are terminated and transferred to the arbitration manager.

The external management may last for up to 18 months and may be extended by the court for a further six-month period. The aggregate term of the financial rehabilitation and external management (in cases where external management was introduced following financial rehabilitation) cannot exceed two years.



Bankruptcy management

Bankruptcy management (winding-up) is the process by which the existence of a company is brought to an end and its assets are distributed for the benefit of its creditors. Bankruptcy management commences if the court decides that the debtor cannot be restored to solvency on the basis of the results of supervision or if the implemented rescue measures have failed.

The management bodies of the debtor are dismissed and replaced by the arbitration manager. The arbitration manager undertakes the sale of the debtor's assets at public auctions. The proceeds of the sales are applied towards the satisfaction of the debtor's obligations to its creditors in the following order of priority established under the Insolvency Law: firstly, claims for harm caused to health and life; secondly, salaries, severance and copyright payments; and thirdly, all other claims.

Tax claims rank equally with general unsecured claims included in the third order of priority.

Bankruptcy management may last for up to six months (and may be extended as a matter of practice an unlimited number of times for a further six-month period each time). On its termination, any unsatisfied debts are cancelled. Formally, the bankruptcy management ends when a winding-up entry is made in respect of the debtor in the state register of legal entities.

Amicable settlement

An amicable settlement can be introduced at any stage of the bankruptcy proceedings. It must be approved by a majority vote of all registered creditors and all secured creditors, and then by the court. It will then be binding on minority creditors. An amicable settlement can provide for the satisfaction of debt not only by the payment of money but also by other means, including the transfer of assets, an extension to payment dates or the issuance of promissory notes. Following the approval of the amicable settlement by the court, all bankruptcy proceedings against the debtor are terminated.

Commencing bankruptcy proceedings

Bankruptcy proceedings against a debtor are commenced in an arbitrazh court by an applicant filing a bankruptcy petition. The court needs to be satisfied that the grounds for initiating bankruptcy proceedings are sustainable.

A petition to initiate bankruptcy proceedings against a debtor may be filed with an arbitrazh court by a creditor, an employee (or a former employee), a governmental agency (eg tax and customs authorities) or the debtor itself. For a creditor (other than a credit institution) and an employee (or a former employee) to file a bankruptcy petition, they must have a court decision or a court act issuing a writ of execution regarding an arbitral award on the recovery of monetary funds (debt) from the debtor, provided that such court decision or court act has been entered into force.

A creditor being a credit institution is not required to confirm the validity of a claim by obtaining a court decision. It must publish a notice of its intention to initiate bankruptcy proceedings in the legal entity information register at least 15 calendar days prior to the date of filing a petition.

A debtor (represented by its chief executive officer or another authorised representative) may initiate bankruptcy proceedings voluntarily by filing a voluntary bankruptcy petition if its bankruptcy is anticipated due to the existence of circumstances clearly evidencing the debtor's inability to perform obligations to its creditors (including payment of salaries and wages) or to make mandatory payments. A debtor is obliged under the Insolvency Law to initiate bankruptcy proceedings by filing a compulsory bankruptcy petition within one month of the following becoming evident or occurring:

(a) the amount of the debtor's debts exceeds the value of its assets ("balance sheet test"); (b) the debtor fails to make payments because it has insufficient funds ("cash flow test"); (c) satisfying claims of one or more creditors may result in the debtor's inability to satisfy claims of all creditors; (d) the enforcement of claims against the debtor's assets will result in significant difficulties for the debtor in continuing its operations; (e) the debtor's shareholders instruct the CEO to file a bankruptcy petition; or (f) salaries or wages due to employees or former employees are overdue for over three months.

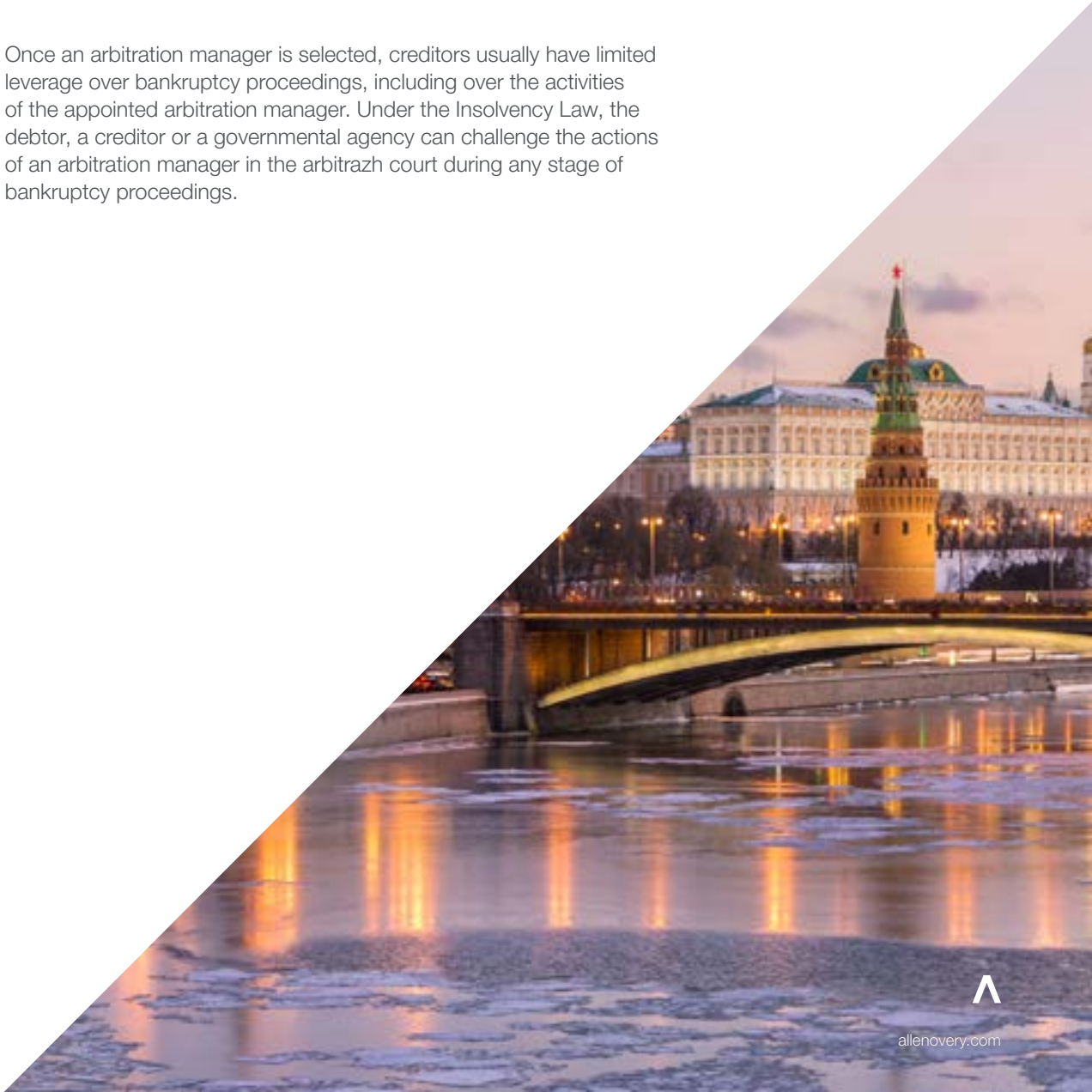
Court's satisfaction that grounds are sustainable

If a creditor has filed a petition, a court will be satisfied that the grounds for commencing bankruptcy proceedings are sustainable if the unsatisfied aggregate debt of the debtor exceeds 300,000 roubles and remains outstanding for three months. If a debtor files a petition, a court generally applies a strict test to determine whether there are grounds for initiating bankruptcy proceedings.

Choice of arbitration manager

In respect of each stage of bankruptcy proceedings, the arbitrazh court appoints an arbitration manager to conduct and manage the relevant stage. Only individuals who are members of a self-regulated organisation of arbitration managers can serve as arbitration managers. In its bankruptcy petition, a creditor or an authorised governmental agency can propose to the arbitrazh court a candidate for the position of arbitration manager. Alternatively, the applicant can specify a self-regulating organisation of arbitration managers which can then recommend a suitable candidate to the arbitrazh court. A debtor has none of these rights.

Once an arbitration manager is selected, creditors usually have limited leverage over bankruptcy proceedings, including over the activities of the appointed arbitration manager. Under the Insolvency Law, the debtor, a creditor or a governmental agency can challenge the actions of an arbitration manager in the arbitrazh court during any stage of bankruptcy proceedings.



Challenging transactions

The Insolvency Law provides additional grounds for invalidating and repudiating transactions entered into by the debtor which would otherwise be valid had bankruptcy proceedings not commenced.

During the external management and bankruptcy management stages of bankruptcy proceedings, the relevant arbitration manager, or a creditor holding more than 10% of the total amount of the debtor's obligations included in the claims register, can petition the arbitrazh court to declare a transaction concluded by the debtor as invalid if it constitutes a suspicious transaction or a transaction that confers preference on a creditor.

A suspicious transaction is a transaction concluded by a debtor: (a) for "inadequate consideration" within a one-year period before the acceptance by a court of a bankruptcy petition or at any time after its acceptance; or (b) with the aim to cause (such aim being known to the debtor's counterparty), and which causes, a detriment to creditors' rights and is concluded within a three-year period before the acceptance by a court of a bankruptcy petition or at any time after its acceptance.

A transaction conferring a preference on a creditor in the form of granting new security for existing obligations, changing the order of priorities for the satisfaction of creditors' claims, resulting or possibly resulting in the satisfaction of unmatured claims of certain creditors when unsatisfied matured claims of other creditors exist or conferring a preference in the satisfaction of creditor's claims when compared to the order of established priority may be declared invalid if it was concluded within a period of one month before the acceptance by a court of a bankruptcy petition or at any time after its acceptance. This period is extended to six months if the transaction combines the creation of new security and the distortion of priority; or if the counterparty was aware that the debtor was cash flow or balance-sheet insolvent.

A transaction which is concluded: (i) at an auction; or (ii) in the ordinary course of business and whose value does not exceed 1% of the value of the debtor's assets, cannot be challenged on the above grounds. In addition, preference rules do not apply to transactions under which a debtor has received adequate consideration.

Preference rules also do not apply to payments arising from a credit agreement or the obligation to make mandatory payments if the debtor, by the time it performed its obligation under the credit agreement or made mandatory payments, did not have any other mature monetary claims (about which the claiming creditor knew) under the credit agreement or due obligations to make mandatory payments, and the performance of the obligations arising from the credit agreement or the obligation to make mandatory payment did not differ in terms and the amount of payments from those set out in the relevant credit agreement or in the applicable legislation.

Secured creditors

Under the Insolvency Law, a secured creditor is a creditor whose claim is secured by a Russian law pledge or mortgage in respect of the debtor's property. No other form of security or quasi-security is recognised as creating secured creditor status under the Insolvency Law.

Secured creditors have the right to vote at a general creditors' meeting, but are not entitled to enforce their security, during the supervision stage of bankruptcy proceedings.

During the financial rehabilitation and external management stages, if a secured creditor wants to obtain voting rights at a general creditors' meeting, it must waive its right to levy execution against the pledged property.

If a secured creditor chooses to enforce its security during the financial rehabilitation and external management stages, it is entitled to apply to the arbitrazh court for such enforcement. A secured creditor may apply to the arbitrazh court in the following cases: (a) if there is a risk of damage to the debtor's pledged property, which may result in the material depreciation of such property or the risk of destruction or loss of such property; and (b) if the enforcement of security will not make the restoration of the debtor's solvency impossible. In this case, the debtor would be obliged to prove the impossibility of restoration of its solvency.

In both cases, the relevant arbitrazh court decides whether it is possible to enforce the security or not. If the court declines the right of a secured creditor to enforce the security, the secured creditor obtains voting rights at the creditors' meeting during the applicable bankruptcy stage.

A secured creditor also enjoys a right of veto to approve or reject an amicable settlement at a general creditors' meeting. Its consent is required to sell, lease or create an encumbrance of the pledged assets.

During bankruptcy proceedings, claims of secured creditors are satisfied in priority over all other claims out of the value of the pledged assets. However, only 80% (for a creditor under a secured credit agreement) or 70% (for all other secured creditors) of the proceeds from the sale of the pledged assets (but not exceeding the principal amount of the debt and any accrued interest) are guaranteed to be allocated to satisfy the claim of a secured creditor.

If after allocation of proceeds from the sale of pledged assets, any secured creditors' claims are still outstanding, such claims rank in the third order of priority as unsecured claims.

In addition, a secured creditor has a right to vote at the general creditors' meeting (without waiver of its right to enforce against the pledged property) in relation to: (1) the appointment of the arbitration manager or self-regulated organisation of arbitration managers; (2) petitioning the arbitrazh court on deprivation of the arbitration manager; (3) petitioning the arbitrazh court on termination of the bankruptcy management; and (4) introduction of the external management.

Set-off

Enforcement of a contractual set-off is possible during the bankruptcy proceedings stages only if it complies with the priority of claims established by bankruptcy legislation or if it is a netting. Netting arrangements under the eligible derivatives and repo master agreements, stock exchange transactions and other transactions that are subject to clearing by a Russian clearing house are allowed by the law, provided that they satisfy certain conditions. As an example, over-the-counter derivatives and repo transactions netting is possible if information about execution of a master agreement and each netted transaction under it have been provided to a Russian repository and included into the relevant register.

Liability

A "controlling person" of a debtor bears subsidiary liability for the debts of that debtor if the inability of the debtor to satisfy all creditors' claims in full occurred as a result of actions (or inactions) of that "controlling person".

The fault of the relevant controlling person is presumed, unless the defendant proves otherwise, if: (a) a "material detriment to creditors' rights" occurred as a result of entry by the debtor into certain transactions upon instruction, approval or for the benefit of that controlling person; (b) mandatory accounting or other corporate documents are lost or found to be falsified or incomplete; (c) creditors' claims caused by a wrongdoing of the controlling person (as confirmed by a court decision) exceed 50% of all claims of the debtor's creditors; or (d) mandatory information about the debtor and its transactions is not published in the relevant state registers on legal entities and their activities, or such published information is incorrect.

The amount of the controlling person's liability is calculated as the aggregate amount of: (a) the value of any creditors' claims included on the claims register of the debtor; (b) the value of the creditors' claims raised after the claims' register was closed; and (c) the value of any current payments remaining outstanding as a result of insufficiency of assets of the debtor.

A "controlling person" for this purpose is a person or an entity which has, or had during the three-year period before the bankruptcy conditions actually occurred and, following that, before the acceptance by a court of the bankruptcy petition: (a) the right to give binding instructions to the debtor; or (b) the ability to determine the actions of the debtor (due to the kindred ties with, or holding an official position in, or being a representative of, the debtor, or for any other reason (including applying force or pressure to the officials or governing bodies of the debtor)). The CEO, chief accountant, financial director and any member of a governing body of the debtor, the parent company of the debtor or any of its officials or any beneficiary of any illegal actions of the debtor are presumed to be the "controlling persons" of the debtor, unless the relevant defendant proves otherwise. A court may also identify any other person as a controlling person based on any other proven ground (including classmates, co-habitants, long-term co-workers, etc).

The inability of the debtor to satisfy all creditors' claims in full could be caused by: (a) a decrease in the value of the debtor's assets; (b) an increase in the claims against the debtor; or (c) failure by the creditors to receive full or partial satisfaction of their claims as a result of the debtor's actions (or inactions). There is currently no materiality criteria stated in the Insolvency Law.

A responsible controlling person could be held to have subsidiary liability for the breach of its obligation to initiate bankruptcy proceeding against the debtor on time. In that case, its liability would be limited by the value of claims occurring during the period starting on the date on which the bankruptcy proceedings should have been initiated, and ending on the date on which they were actually initiated.

A petition on subsidiary liability may be filed by the bankruptcy manager (on its own or on a creditor's instruction), a creditor, a representative of employees, an employee (or a former employee) or, in certain cases, state authorities. The period for such filings is limited to three years from the moment a claimant knew or should have known about the grounds for its claim, or three years since the debtor was declared bankrupt, or ten years after the wrongful actions or inactions of the controlling person actually occurred.

All parties to a subsidiary liability claim may agree a settlement with regards to such claim. An "amicable settlement" agreement has to be approved by the court.

Information on claiming subsidiary liability and the following court decisions has to be published in the federal register of data on bankruptcy.

In addition, the CEO, members of governing bodies of the debtor, a shareholder of the debtor or other controlling persons could be held liable for damages caused by their actions.

Claiming subsidiary liability does not exclude claiming the reimbursement of damages caused by the actions of the governing bodies or other controlling persons at the same time, to the extent such damages are not covered by the amount of the subsidiary liability.

The Russian Civil Code also provides for a parent company's liability for the bankruptcy of its subsidiary if the bankruptcy was caused by a parent company.

The CEO of a debtor (and in certain cases, the liquidation commission of a debtor) is liable for any delay in the filing of a bankruptcy petition as well as for any wrongful filing (ie filing when the debtor was capable of satisfying all creditors' claims).

Russian law establishes criminal and administrative liability of the CEO, shareholders (participants) and potentially directors of the debtor for bankruptcy and actions during bankruptcy. For example, the CEO or shareholder may be held criminally liable for intentionally taking steps that led to the inability of the debtor to satisfy the monetary claims or make mandatory payments in full if such actions or omissions have resulted in serious damage. Administrative sanctions may be imposed particularly for the following actions: (a) withholding, concealing, transferring or destroying assets or information on the assets of the debtor, falsifying accounting documents when the company has signs of insolvency; (b) illegal satisfaction of creditors' claims with knowledge that such satisfaction is prejudicial to other creditors; and (c) failure by the arbitration manager to perform its obligations.

Types of security

The main forms of security available under Russian law are:

- pledge of an enterprise (not used in practice);
- real property mortgage or pledge of immovables;
- pledge of shares (participation interests) or marketable securities;
- pledge of rights under contracts (receivables);
- pledge of special bank accounts;
- pledge of intellectual property;
- pledge of movable property (equipment);
- pledge of raw materials and inventory (pledge of goods in circulation); and
- floating charge (new and not used in practice yet).

There are other types of security available under Russian law, such as suretyship, independent guarantee, penalty and others. However, none of them creates the secured creditor status under the Insolvency Law.

Trusteeship is generally not recognised in Russia and the parallel debt covenant is not used in Russian law. Each of the creditors and their future assignees should be entered in any asset title register (eg real property or share register) where required. There are two alternatives available under Russian law: (1) joint and several creditorship (in substance, this concept is close to the parallel debt covenant and helps to avoid the registration of each single creditor or assignee in the relevant asset title registers); and (2) appointment of a pledge manager by multiple creditors/ co-pledgees involved in entrepreneurial activity. The pledge manager is effectively an agent of the pledgees, acting on their behalf and in their interests for a fee, and can enter into the pledge agreements with the pledgors and/or exercise all rights and obligations of the pledgee under such pledge agreements. The main disadvantage of the pledge manager concept is that each creditor itself or its assignee has to be entered into the relevant asset title register as a secured creditor. There is an exception for certain types of pledges securing obligations under the Russian law syndicated loans. In particular, a pledge of movable property and a pledge of securities could be registered solely in the name of the pledge manager (no information about each pledgee is required and, accordingly, upon a transfer of claims by any individual lender the information about the pledgees does not need to be updated). As to the pledge of participation interests in limited liability companies or mortgages, in the same way as with other loans, the information about all pledgees has to be: (a) provided to the title registers, together with the information about the pledge manager; and (b) has to be updated upon each transfer of claims by a lender (this may be done through an application by the pledge manager to the relevant title registers).

Enforcement of security

Outside bankruptcy proceedings

There are no limitations on the enforcement of security before the initiation of bankruptcy proceedings. There is a risk, however, that any enforcement of security occurring within the six-month period before the acceptance of a bankruptcy petition may be set aside on the grounds of preferential satisfaction, as discussed above.

An out-of-court enforcement procedure is available for both pledges of movable property and immovable property (except where the mortgage is created over residential housing owned by individuals or over state or municipal immovable property).

If a pledge (or mortgage) agreement was notarised, the pledgor (or mortgagor), instead of applying to a court, has a right to apply to a notary for its endorsement (after a minimum period of 14 days from the day of receipt by the debtor of the event of default notice). On the basis of a notary's endorsement, the pledgee (mortgagee) can petition the state enforcement agency to seize the pledged (or mortgaged) property. Out-of-court enforcement without a notary's endorsement is only possible if the pledged movable property is in the pledgee's possession or if the pledgor voluntarily transfers the pledged assets to the pledgee.

For the purpose of enforcement in court, three methods of realisation are available: (i) public auction (ie a sale organised by the state enforcement agency in judicial enforcement proceedings); (ii) assumption of title by the pledgee; and (iii) sale to a third party (this option is not available for mortgages). Options (ii) and (iii) above are available only if the pledgor is involved in entrepreneurial activity. In the case of an out-of-court enforcement, the parties may agree upon multiple methods for realisation of the pledged property with the right of the pledgee to choose the most appropriate method upon enforcement, and, in addition to the above methods, the parties may choose to sell the pledged assets at an alternative private auction.

The realisation of the pledged (mortgaged) property can take place after a minimum period of ten days from the day of receipt by the pledgor (mortgagor) of the enforcement notice.

During bankruptcy proceedings

Bankruptcy freezes the enforcement of security interests by secured creditors. Security may be enforced during financial rehabilitation or external management proceedings (ie after the supervision procedure has been completed) in certain limited cases and after obtaining a court order. During these bankruptcy proceedings, the sale of pledged assets subject to a pledge can only be performed by the arbitration manager at an auction, which can also take place online.

Claims of secured creditors are satisfied in priority over all other claims out of the value of the relevant pledged assets. As described above, secured creditors are guaranteed to receive up to 80% (for a creditor under a secured credit agreement) or 70% (for all other secured creditors) of the proceeds from the sale of the pledged property. The remaining proceeds are allocated as follows:

– 15/20% are allocated to satisfy the claims of creditors in the first and second order of priority only if there are insufficient proceeds from other assets to cover these claims. If such claims have been fully satisfied, the remainder can be used to discharge any outstanding claims of the secured creditors; and

– 5/10% are allocated to court and bankruptcy proceedings expenses.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

Igor Gorchakov
Partner
Tel +7 495 662 6547
igor.gorchakov@allenovery.com

Sergey Blinov
Counsel
Tel +7 495 662 6528
sergey.blinov@allenovery.com

Ian Field
Partner
Tel +44 20 3088 2671
ian.field@allenovery.com

Jennifer Marshall
Partner
Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Lucy Aconley
Counsel
Tel +44 20 3088 4442
lucy.aconley@allenovery.com

Nicola Ferguson
Senior PSL
Tel +44 20 3088 4073
nicola.ferguson@allenovery.com

Harini Viswanathan
Associate
Tel +44 20 3088 3992
harini.viswanathan@allenovery.com

Further information

Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please click **here**.

For more information, please contact:

Moscow

Allen & Overy Legal Services
Dmitrovsky pereulok 9
Moscow
107031
Russia

Tel +7 495 725 7900

London

Allen & Overy LLP
One Bishops Square
London
E1 6AD
United Kingdom

Tel +44 20 3088 0000
Fax +44 20 3088 0088

GLOBAL PRESENCE

ROW
CS2003_CDD-59369_ADD-92223_Russia