



# **INSOL International**

## **Liability of Controlling Persons in Corporate Insolvency: Evolving Trends in Russian Law and Practice**

**February 2019**

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## Acknowledgement

INSOL International is very pleased to present a technical paper titled 'Liability of Controlling Persons in Corporate Insolvency: Evolving Trends in Russian Law and Practice' by Pavel Novikov, Senior Associate and Andrey Bogdanov, Junior Associate, Baker & McKenzie, Russia.

For many years the Russian market has suffered from various types of corporate governance abuse. The most common problem has been the abuse of the corporate form and the concept of limited liability to avoid repaying a company's debts. Corporate bankruptcy proceedings in Russia have increasingly been used as a tool by controlling persons of bankrupt companies to dissipate assets and avoid personal liability. To address this and to increase recoveries for creditors, Russia's corporate bankruptcy law has been amended to expand the list of persons who may be held vicariously liable for a bankrupt company's debts and to clarify the grounds for such liability.

Under the new rules, in addition to the chief executive officer, other senior managers, including members of the executive board, as well as liquidators and other persons who controlled or had significant influence over the bankrupt's actions by kinship or position, or could force the bankrupt to enter into unprofitable transactions, may be made vicariously liable for a bankrupt company's debts. The expanded list also includes those holding a majority shareholding of 50% or more in the authorised share capital; and persons who profited from the illegal actions of the management.

This paper provides an overview of the new rules; the recent trends in court practice in application of the new rules; and the Russian Supreme Court Resolution which provides clarification on the general principles of secondary liability, the status of controlling persons, the grounds for holding controlling persons liable, as well as certain procedural aspects.

INSOL International sincerely thanks Pavel Novikov and Andrey Bogdanov for providing our members with this interesting and informative technical paper.

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## Liability of Controlling Persons in Corporate Insolvency: Evolving Trends in Russian Law and Practice

By Pavel Novikov, Senior Associate and Andrey Bogdanov, Junior Associate, Baker & McKenzie, Russia\*

### 1. Introduction

Whilst the number of corporate insolvencies in Russia is increasing, the overall rate of satisfied creditors' claims remains relatively low. For example, in 2017 - the year in which the amendments referred to in this paper entered into force - there were 13,577 corporate insolvency cases, an increase of 7.7 % compared to the previous year. In the same year, only 5.5 % of creditors' claims were satisfied compared to 6 % in 2016 and 6.3 % in 2015.<sup>1</sup> From a practical standpoint, such a low rate of claims satisfaction is partially attributable to the use of corporate structures and insolvency proceedings to dissipate assets and avoid personal liability.

Against this background, in 2017 Russia's bankruptcy law was amended to expand the list of persons who may be held vicariously liable for a bankrupt's debts and to clarify the grounds for such liability.

The amendments were introduced by Federal Law No. 266-FZ dated 29 July 2017 on Amendments to the Federal Law on Insolvency (Bankruptcy) and the Code of Administrative Offences of the Russian Federation, effective as of 4 August 2017 (the Amendments).

The Amendments extend the scope of liability of controlling parties in the event of bankruptcy. Prior to the Amendments coming in to force, the secondary liability of controlling persons was governed by a limited number of articles of the RF Federal Law No. 127-FZ on Insolvency (Bankruptcy) (the Bankruptcy Law). Such a legislative gap was subsequently supplemented by the State Arbitrazh (commercial) courts, which elaborated practical approaches, later reflected in July 2017 by the Amendments. Hence, the Amendments, to a great extent codified certain existing court practice regarding the following aspects of secondary liability:

#### 1.1 Controlling person status

Under the Bankruptcy Law, a controlling person is defined as an individual or legal entity entitled to give mandatory instructions to the debtor or otherwise direct its actions in the period not exceeding three years before the onset of insolvency indications or the court's acceptance of a bankruptcy application.

The Amendments introduced a number of landmark criteria to be used for the identification of controlling person status. The list of the said criteria is non-exhaustive and includes the following:

- (i) affiliation with the debtor;<sup>2</sup>
- (ii) the authority to enter into transactions on behalf of the debtor;
- (iii) occupational status forcing the debtor to make deals; and
- (iv) controlling influence.

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\* The views expressed in this paper are the views of the authors and not of INSOL International, London.

<sup>1</sup> The Information Bulletin of the Unified Federal Register of Bankruptcies for 2017 is available in Russian via [this link](#).

<sup>2</sup> Notably, the Amendments give broad interpretation to the term 'affiliation'. The status of controlling person is presumed in case of kinship, occupational, or other relations with the officials of the debtor (CEO and / or members of the executive board) (Article 61.10 (1) Bankruptcy Law).

The amendments increase the number of circumstances in which a person / legal entity is presumed to be a controlling person including:

- (i) in addition to the Chief Executive Officer (CEO), other senior managers, including the Chief Finance Officer, Chief Operating Officer and accountants, as well as liquidators and other persons who controlled or had significant influence over the bankrupt's actions by kin or position, or could force the bankrupt to enter into unprofitable transactions;
- (ii) those holding a majority shareholding of 50% or more in the authorised share capital; and
- (iii) those that profited from fraudulent or improper actions conducted by a debtor's executive bodies.

The Amendments clarify that shareholders owning less than 10% in the bankrupt company shall not be deemed controlling unless it is proven that they played a role in the company's bankruptcy.<sup>3</sup>

## 1.2 Grounds for secondary liability

The amended Bankruptcy Law provides for two<sup>4</sup> main causes where the secondary liability of controlling persons may be invoked:

- (i) inability to satisfy creditors' claims caused by actions of a controlling person;<sup>5</sup>
- (ii) failure to file a petition for voluntary bankruptcy proceedings.<sup>6</sup>

The crucial issues of each cause are identified below:

### 1.2.1 *Inability to satisfy creditors' claims*

#### 1.2.1.1 *Conditions*

Under the amended Bankruptcy Law the fault of the controlling person in causing damage to the creditors is presumed provided one of the following conditions is met:

- (i) *The transactions made or approved by the controlling person caused harm to the creditors' pecuniary rights.*

The insolvency manager and / or creditors may demand that controlling persons be made vicariously liable for causing significant damage to the creditors as a result of transactions made by the debtor for the benefit of or with controlling persons or with the approval of controlling persons. The court may review such transactions and conclude that they caused damage to the bankrupt within the vicarious liability proceedings, even if such transactions have not been invalidated within claw-back proceedings. The law now directly states<sup>7</sup> that detrimental transactions may cause secondary liability where:

- a claw-back claim was never filed;
- a claw-back claim is under consideration and a decision has not yet been rendered;
- the court refused to declare the transaction void due to the bona fide contractor or expiration of the limitation period.

<sup>3</sup> See Article 61.10 (6) Bankruptcy law.

<sup>4</sup> Notably, creditors may also claim damages for infringement of corporate legislation by a controlling person. Such claims are subject to consideration under the rules provided for secondary liability. See Article 61.20 of the Bankruptcy Law.

<sup>5</sup> Article 61.11 Bankruptcy Law.

<sup>6</sup> Article 61.12 Bankruptcy Law.

<sup>7</sup> Article 61.11 (3) Bankruptcy Law.

- (ii) *The accounting records and / or corporate documentation of the debtor are absent, misrepresented or do not contain the mandatory information provided by law and such violations significantly hinder bankruptcy proceedings (if such circumstances are proved, in addition to the company's CEO and chief accountant, external accountants and organisations retained for keeping records may be also held liable).*

The court will consider bankruptcy proceedings to be significantly hindered if, due to the misrepresentation of accounting and / or corporate records:

- a bankruptcy administrator is unable to determine the debtor's assets or challenge detrimental transactions;
  - it is impossible to reveal / identify corporate decisions which caused harm to the debtor and could give rise to a claim for damages against the debtor's management.<sup>8</sup>
- (iii) *The actions (or inaction) of controlling persons make it impossible to satisfy creditors' claims, more than half of which consist of claims arising out of administrative, criminal or tax offences.*

From a practical standpoint, this provision mainly deals with the tax liability of the debtor for understatement of the tax base, inaccurate calculation of the sum of a tax or another violation of tax law.

- (iv) *Information in the state registers about the debtor is absent or misrepresented.*

Under Russian Law companies are obliged to provide information on their shareholders, authorised share capital / assets and commercial activity in several public registers (for example, the Uniform State Register of Legal Entities). Failure to provide accurate and reliable information to the registration authorities may now cause secondary liability.

#### 1.2.1.2 *Scope of liability*

Under the Bankruptcy Law the scope of liability of a controlling person is equal to the aggregate amount of registered and unregistered claims unsatisfied due to the lack of debtor's assets.<sup>9</sup>

#### 1.2.1.3 *Exemptions*

The court may reduce the scope of controlling person's liability, should the latter prove that the harm caused by his / her actions to the pecuniary interests of the creditors is significantly lower than the aggregate amounts of registered and unregistered claims.

Officers and shareholders will not be held liable (or their liability will be decreased) if it is proven that the bankrupt was *de facto* controlled by another person. The burden of proof in this case rests with the director (or shareholder).

Controlling persons do not bear liability in the absence of their fault. To avoid liability, the controlling person shall prove that its actions were in the ordinary course of business and did not violate the interests of the bankrupt or third parties. The court may also exempt controlling persons from liability if it is proven that such actions were committed to prevent larger losses to the bankrupt's creditors.

<sup>8</sup> See the Plenary Resolution of the RF Supreme Court No. 53 (Section 24).

<sup>9</sup> Article 61.11 (11) Bankruptcy Law.

## **1.2.2 Failure to file for bankruptcy**

### **1.2.2.1 Conditions**

Under the Bankruptcy Law the debtor's management is obliged to file for bankruptcy once one of the following indications are revealed:<sup>10</sup>

- (i) the satisfaction of claims of one creditor will prohibit the debtor from satisfying other creditors' claims and / or tax obligations;
- (ii) the liquidation commission or other responsible management body of the debtor decides to initiate bankruptcy proceedings;
- (iii) foreclosure of the debtor's property will prevent the debtor from carrying out commercial activity;
- (iv) monetary obligations of the debtor exceed the value of the debtor's assets and / or the debtor's funds are insufficient for the repayment of outstanding debts.

### **1.2.2.2 Liable persons**

Prior to the Amendments, only the CEO was responsible for filing a voluntary bankruptcy petition and hence was the only person subject to secondary liability for failure to file a voluntary bankruptcy petition. Now, if the debtor's director(s) fails to file such a petition, the other controlling persons (i.e. shareholders) are obliged to convene a general meeting to decide on filing the voluntary bankruptcy petition.<sup>11</sup> All persons at fault are held jointly liable.

### **1.2.2.3 Timing**

The debtor's directors or shareholders are obliged to file voluntary bankruptcy petitions within the following time limits:

- (i) the director(s) - one month after the onset of insolvency indications;
- (ii) the shareholder(s) - not later than 20 days after the directors' failure to file the petition the shareholders are required to convene a general meeting and take the decision to file a voluntary bankruptcy petition with the court.

### **1.2.2.4 Scope of liability**

Under the Bankruptcy Law the scope of liability of controlling persons is equal to the aggregate amount of creditors' claims accrued after the debtor's management or shareholders fail to file a voluntary bankruptcy petition.

Under the Bankruptcy Law, the controlling person has the burden of proving the absence of the causal link between failure to file the bankruptcy petition in due time and the bankrupt's failure to satisfy creditors' claims.

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<sup>10</sup> Article 61.11 (2) Bankruptcy Law.

<sup>11</sup> Article 9 (3.1) Bankruptcy Law.

#### 1.2.2.5 Exemptions

The Amendments set forth that the claims of a creditor (except for tax claims and claims arising out of obligatory contracts) who was well aware of the circumstances that obliged the controlling person to file a voluntary bankruptcy petition shall not be included into the scope of secondary liability.

### 1.3 Procedural aspects

The Amendments substantially clarify peculiarities of proceedings against controlling persons. Now secondary liability claims can be filed during any bankruptcy procedure (supervision, financial rehabilitation and liquidation).

Bankruptcy creditors, a bankruptcy administrator, employees or tax authority may file a claim for secondary liability even after the debtor is declared bankrupt or bankruptcy proceedings are terminated due to a lack of funds for financing bankruptcy proceedings. Creditors can file such claims not later than three years after declaration of bankruptcy or termination of bankruptcy proceedings, but in any case not later than 10 years after the violations of the controlling person took place.<sup>12</sup>

A controlling person can now participate in the hearings for secondary liability claims as a defendant and possesses all rights and obligations provided for by procedural law. The new provisions provide significant incentive for active participation by the controlling person in secondary liability hearings. It is now a statutory obligation for a controlling person to file a comprehensive statement of defence against a claim for secondary liability.<sup>13</sup> Failure to fulfil this obligation may cause the shift of burden of proof of the grounds for secondary liability from the bankruptcy creditor / bankruptcy administrator to a presumption of liability against the controlling person.<sup>14</sup>

It is directly specified that, in the case of insolvency of the controlling person, such person's bankruptcy creditors have a right to enter secondary liability proceedings as third parties on the controlling person's side.

Under the new provisions, each creditor is entitled to choose from among the options of disposition of the claim against the controlling person.<sup>15</sup> In particular, a creditor may choose:

- (i) To enforce the claim against the controlling person within bankruptcy proceedings of the debtor. In this scenario, enforcement proceedings of secondary liability claims are the same as collection of ordinary receivables of the debtor.
- (ii) To initiate a sale of the claim / assignment of the cause of action against the controlling person. Should the creditor choose this option, the claim against the controlling person is put out to tender in the manner provided for under the Bankruptcy Law.<sup>16</sup>
- (iii) To receive a claim against the controlling person by means of partial assignment. In this case, a creditor may individually initiate enforcement proceedings against the controlling person instead of participating in bankruptcy proceedings against the debtor.

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<sup>12</sup> Article 61.14 (5) Bankruptcy Law.

<sup>13</sup> Article 61.15 (2) Bankruptcy Law.

<sup>14</sup> Article 61.16 (4) Bankruptcy Law.

<sup>15</sup> Article 61.17 Bankruptcy Law.

<sup>16</sup> Article 140 (2) Bankruptcy Law.



## 2. The Supreme Court's interpretation of the new rules on secondary liability

On 21 December 2017 the Plenum of the RF Supreme Court introduced Resolution No. 53 (the Resolution) providing clarifications of the new rules for secondary liability of controlling persons. Within the Russian court system, clarifications issued by the plenary sessions of the RF Supreme Court play a dramatic role and significantly influence court practice. The Resolution includes clarifications on the general principles of secondary liability, the status of controlling persons, the grounds for holding controlling persons liable, as well some procedural aspects as follows:

### 2.1 General principles of secondary liability

The Resolution defines secondary liability as an exceptional protective measure aimed at restoration of creditors' rights. Hence, as stated in the Resolution, when applying secondary liability rules, the court should appreciate the basic concepts of corporate law, namely, the separate liability of the corporation and its shareholders; the autonomy of corporate and personal estates; business judgement rules and the prohibition on the fraudulent operation of corporate structures.

### 2.2 Controlling person status

The Resolution gives a broad interpretation to presumptions of controlling person status, stressing the importance of the factual control test and the level of the controlling person's engagement in the commercial activities of the debtor.

The Resolution provides for the definition of *objective bankruptcy* — the moment the debtor fails to satisfy creditors' claims in full as the aggregate amount of liabilities exceeds the real market value of the debtor's assets. The objective bankruptcy test is applied by the Supreme Court in a wide range of cases, including:

- (i) determination of the obligation to file for voluntary bankruptcy proceedings;
- (ii) establishing a causal connection between a debtor's inability to satisfy a claim in full and the actions of the controlling person;
- (iii) imposing joint and several liability of several controlling persons.

The Resolution elaborates on the status of a *nominal director* — an individual formally carrying out management of the debtor under the influence of the beneficial owner. A nominal director's secondary liability is subject to no exemptions, unless information on the real controlling person is provided and / or concealed assets of the debtor are revealed by the nominal director.<sup>17</sup> The Resolution encourages the courts to assess the effect of the information provided by the nominal director on the restoration of the creditors' rights.

### 2.3 Failure to file for bankruptcy

According to the Resolution, to determine the obligation to file a voluntary bankruptcy petition, courts should assess the behaviour of the debtor's management through the lens of a prudent and reasonable manager in similar circumstances, guided by commercial practice standards.

The Resolution states<sup>18</sup> that in order to hold a controlling person (apart from the director / liquidator) liable for failure to file a voluntary bankruptcy petition the following conditions should be met:

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<sup>17</sup> Article 61.11 (9) Bankruptcy Law.

<sup>18</sup> Section 13 of the Resolution.

- (i) it must be proved that the individual / legal entity had factual control over the debtor's activity;
- (ii) such individual / legal entity knew or should have known about the unsatisfactory financial condition of the debtor and failure of the debtor's management to file a voluntary bankruptcy petition; and
- (iii) the controlling person failed to take the required actions despite it being empowered to convene a general meeting of the debtor to approve a decision to address the court with a voluntary bankruptcy petition.

The scope of secondary liability may be reduced if the management of the debtor proves that despite temporary poor financial conditions, commercial operations were carried out according to an economically feasible plan.

## 2.4 Inability to satisfy creditors' claims

According to the Resolution,<sup>19</sup> the following circumstances shall be considered evidence of the controlling person's fault:

- (i) the debtor under the influence of the controlling person entered into a transaction with undercapitalised shell companies and / or the terms and conditions of such transactions were unfavourable to the debtor;
- (ii) the controlling person appointed incompetent management;
- (iii) the management structure of the company is designed to allocate all risks and liabilities to the debtor, while leaving all profit and benefits to third-party beneficiaries.

The RF Supreme Court specifically indicates in the Resolution that the commercial activity of the debtor in many cases depends on a series of consequent decisions and hence only one transaction that critically affected the debtor shall not be considered as a single prerequisite for the insolvency of the debtor, and so courts should not refrain from a detailed analysis of the commercial activity of the debtor.

The courts should take into account business judgement rules and not intervene in the commercial activities of the debtor's management. The Resolution excludes secondary liability if actions of the controlling person correspond with ordinary entrepreneurial risk and were not aimed to cause detriment to the creditors.<sup>20</sup>

## 3. The trends in court practice when applying the new rules

### 3.1 General comment

It seems obvious that it will take more than 18 months for the courts to come up with a stable approach to the application of the new provisions of the Bankruptcy Law. However, an analysis of recent court practice demonstrates the following trends:

### 3.2 Detailed approach

Courts have become more attentive to an analysis of controlling persons' activities prior to bankruptcy. Courts consider the following actions of a controlling person as defences from secondary liability:

- (i) application to the state authorities for monetary support;

<sup>19</sup> Section 16 of the Resolution.

<sup>20</sup> Section 18 of the Resolution.

- (ii) attempts to collect receivables;
- (iii) managing creditors' claims by means of set-offs / settlement agreements; and
- (iv) implementing debt repayment schedules, crisis plans. etc.<sup>21</sup>

### 3.3 Shareholders' liability

As for secondary liability of shareholders for failure to file a voluntary bankruptcy petition, the courts have taken into account attempts by the majority shareholder to convene a general meeting to approve recourse to the court. Failure to exert any effort to initiate an application for voluntary bankruptcy proceedings entails secondary liability.<sup>22</sup>

Only shareholders who:

- (i) had actual control over the executive bodies of the debtor;
- (ii) approved a crisis plan;
- (iii) held (solely or collectively) a majority stake in the debtor's shared capital

are responsible for the debtors' financial condition and hence may be subject to secondary liability.<sup>23</sup>

### 3.4 Damages

In case of refusal to impose secondary liability, the court may nevertheless award damages caused by bad faith actions of controlling persons.<sup>24</sup> Should this be the case, the court will analyse the debtor's transactions with respect to their economic rationale<sup>25</sup> or tax offences.<sup>26</sup>

## 4. Rights of foreign office-holders in secondary liability proceedings

Under Russian bankruptcy rules, foreign entities / individuals enjoy the same rights within bankruptcy proceedings as nationals and Russian incorporated companies.<sup>27</sup>

A foreign office-holder, therefore, is entitled to participate in secondary liability proceedings once his / her claims are included in the bankruptcy register of the debtor or, in certain cases, if he / she has a current claim against the debtor, which is subject to priority satisfaction before registered claims.<sup>28</sup> There are no specific exemptions with regards to participation of foreign office-holders in secondary liability proceedings.

## 5. Practical conclusions

The Amendments expand the list of persons who may be subject to secondary liability and grounds / circumstances for recognising fault for a company's bankruptcy, sending a warning signal to

<sup>21</sup> See, for example, Resolution of the Third Arbitrazh (State Commercial) Court dated 7 July 2018 (Case No. A33-11420/2016k6); Resolution of the Third Arbitrazh (State Commercial) Court dated 1 June 2018 (Case No. A74-347/2015); Ruling of the RG Supreme Court dated 20 July 2017 (Case No. A50-5458/2015); Ruling of the RG Supreme Court dated 29 March 2018 (Case No. A12-18544/2015).

<sup>22</sup> See Ruling of the Moscow Arbitrazh (State Commercial) Court dated 13 April 2018 (Case No. A40-84062/2016), Resolution of the Ninth Arbitrazh (State Commercial) Court dated 14 September 2018 (No. A41-29520/16).

<sup>23</sup> See Ruling of the RF Supreme Court dated 21 February 2018 (Case No. A68-10446/2015), Ruling of the Supreme Court dated 10 December 2018 (Case No. A53-4511/2016).

<sup>24</sup> For instance, bad faith actions of CEO are presumed if he / she entered into the transactions on obviously unprofitable and unfair terms for the corporation or knew that the contractor was a shell-company, which was unable to repay the corporation (See Article 53.1 of the RF Civil Code and Plenary Resolution of the RF Supreme Court dated 30 July 2013 No. 62 (2(4))).

<sup>25</sup> See Resolution of the Arbitrazh (State Commercial) Court for Ural District dated 21 May 2018 (Case No. A76-6593/2013).

<sup>26</sup> See Ruling of the Arbitrazh (State Commercial) Court dated 25 June 2018 (Case No. A27-16228/2016).

<sup>27</sup> Article 1 (5) Bankruptcy Law.

<sup>28</sup> Article 61.14 (3) Bankruptcy Law.

management and business owners as well as controlling persons, including financial and executive directors, accountants, auditors and even organisations responsible for maintaining the company's records.

Analysis of a recent court practice demonstrates that upon the introduction of the Amendments, the courts have taken a detailed approach to determine the grounds for secondary liability, while controlling persons are more willing to submit comprehensive defences against secondary liability claims.

According to the statistics, in 2018 the portion of satisfied secondary liability claims increased by 10%. Notably, this increase has had an extraterritorial effect: controlling persons that have been held secondarily liable have included individuals from Germany, Finland, Latvia, Great Britain and Canada.<sup>29</sup>

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<sup>29</sup> Information Bulletin of the Unified Federal Register of Bankruptcies for 2018 is available in Russian via [this link](#).



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