The Restructuring Review

Ninth Edition

Editor
Christopher Mallon

Law Business Research

The Restructuring Review

Ninth Edition

Editor
Christopher Mallon

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Thomas Lee

SENIOR ACCOUNT MANAGERS
Felicity Bown, Joel Woods

ACCOUNT MANAGERS
Jessica Parsons, Adam Bara-Laskowski, Jesse Rae Farragher

MARKETING COORDINATOR
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Gina Mete

SUBEDITOR
Claire Ancell

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-22-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

AKINWUNMI & BUSARI LEGAL PRACTITIONERS

BÄR & KARRER AG

CLIFFORD CHANCE

DE PARDIEU BROCAS MAFFEI AARPI

DHIR & DHIR ASSOCIATES

GARRIGUES

GILBERT + TOBIN

GÖRG PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

GRIMALDI STUDIO LEGALE

HARNEY WESTWOOD & RIEGELS

HUTABARAT, HALIM & REKAN

INDEPENDENT ADVISORY (PTY) LIMITED

KVALE ADVOKATFIRMA DA

LINKLATERS LLP

LUNDGRENS

MAYER BROWN JSM

NAGASHIMA OHNO & TSUNEMATSU

RITCH, MUELLER, HEATHER Y NICOLAU, SC

ROSCHIER ADVOKATBYRÅ AB

SARANTITIS LAW FIRM

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

STRELIA

TOZZINIFREIRE ADVOGADOS

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

WOLF THEISS ATTORNEYS-AT-LAW

CONTENTS

EDITOR'S PREFACE

I am very pleased to present this ninth edition of The Restructuring Review. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2016, with a view to the coming year, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

Recent years have seen considerable drama unfold in the economic and political spheres and it seems that 2016 is proving remarkable even by these standards. Restructuring and insolvency practitioners based in the United Kingdom have of course been preoccupied by the implications of the vote to leave the European Union, which are discussed in more detail in the England & Wales chapter of this volume. The realignment of British politics and policy presaged by Brexit appear to form part of a wider trend in the advanced democracies for the reassertion of national and popular politics after a long period of affluent apathy. In the wider world, the continuing turmoil in the Middle East and the adoption of an ever more assertive posture by China suggest prolonged uncertainty and the further overturning in the future of long-held assumptions in politics and diplomacy.

Given the context, anyone claiming to be able to predict clearly the future of the global economy cannot be believed. All we can say for certain is that anything can happen.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. At the time of writing the previous edition of the Restructuring Review, many commentators were predicting the end of the current policy mix of ultra-low (or in some cases negative) interest rates and monetary laxity in the months to come, with potentially grave results for many over-leveraged businesses. The renewed uncertainty prevailing at the time of writing this ninth edition suggests that the historically unprecedented monetary policy approach of previous years may in fact be set to continue for some time, and a reversion to the pre-crisis world seems ever further away.

While, of course, no credible predictions as to the consequences of the above factors for insolvency and restructuring activity are possible, past experience has taught us that where there is uncertainty and stress there is a healthy restructuring market. As such, this work continues to be relevant and important, in particular, as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this work would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2016

Chapter 22

RUSSIA

Vladimir Barbolin and Adam Fadian[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Russian economy has been facing what many have described as a perfect storm. Declining oil prices, a volatile rouble, soaring interest rates and inflation, persistent capital flight and restricted access to international capital markets, all set against a backdrop of ongoing geopolitical uncertainty surrounding the crisis in Ukraine, are just some of the headwinds confronting the Russian economy and contributing to this storm. The International Monetary Fund predicts that the Russian economy will contract by 3.4 per cent in 2015. This slowdown has triggered a number of notable debt restructurings in Russia and in certain areas (including metals and aviation), with medium-sized businesses facing even bigger problems and a lack of refinancing opportunities. According to statistics,[2] nearly 14,554 companies were declared bankrupt in Russia, with 37,884 cases in total being initiated. Due to the liquidity crisis and declining demand in tourism, the banking and tourism sectors face a number of large bankruptcies with some top players falling into liquidation.

While a number of the headwinds facing the Russian economy persist, some are beginning to subside. In particular, the rouble seems to be stabilising, interest rates are coming down and the freeze in the international loan markets is slowly beginning to thaw. However, it is too early to tell whether the worst of the storm has past, and it remains unclear the extent to which the remaining macroeconomic and geopolitical headwinds will impact the level of restructuring and insolvency activity in Russia throughout the remainder of 2015. Signs of stress are already apparent, with some companies already discussing potential reschedulings and restructurings with their creditors. In most cases, the trend for larger

1 Vladimir Barbolin and Adam Fadian are counsels at Clifford Chance. The information contained in this chapter is accurate as of August 2015.

2 www.interfax.ru/business/424994.

companies continues to be for debt restructurings to occur consensually and outside of formal insolvency proceedings, often commencing with a formal stand-still or forbearance period, and with a focus on assets sales as a means of raising funds that can be applied to reduce debt.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

There is no statutory regime for restructuring a company's debts outside formal insolvency proceedings, and no US Chapter 11-equivalent protection. Until recently, 'stand-still agreements' and other similar arrangements introducing a moratorium on enforcement of creditors' claims and security against a Russian debtor, which may be available in other jurisdictions for the purposes of facilitating a restructuring, were considered not to be enforceable in Russia, unless the terms of each relevant agreement under which the debt obligations have arisen are amended. However, with recent changes to the Civil Code coming into effect as of 1 June 2015, stand-still arrangements are now available as a legal concept in Russia, although their application and the legal practice around this new instrument are yet to be tested, including in the context of bankruptcy proceedings.

Most of the legislation regulating the insolvency of different types of entities in Russia, including financial and credit organisations, natural monopolies etc., is contained in the Federal Law No. 127-FZ on insolvency of 26 October 2002 (Insolvency Law), which was significantly amended at the end of 2008, in the middle of 2009 and at the end of 2014. There have also been various clarifications from the Russian Supreme Arbitrazh Court on the application of the insolvency legislation.

i Insolvency proceedings

Insolvency proceedings can be commenced at the petition of:

a a third-party creditor having a monetary claim against the company that has been confirmed by a court decision (except for a claim of a credit organisation);

b a government agency in respect of debts owed to the state budget (e.g., to the tax and customs authorities); or

c the company itself (based on the decision of its directors or shareholders).

Generally, for the commencement of insolvency proceedings by a creditor or a government agency, the unpaid debt should be equal to or exceed 300,000 roubles, be overdue for at least three months and must have been confirmed by the insolvency court as well founded.

Insolvency hearings take place before the local arbitrazh court (the insolvency court) in the area in which the company is registered, but decisions of that court may be appealed in courts of higher instance. There are generally five possible stages of insolvency proceedings that may be applied against a Russian company.

Supervision is the first compulsory insolvency stage, which can last up to seven months and involves the appointment by the insolvency court of an interim administrator whose primary aim is to preserve the company's assets while conducting a financial audit of the company to determine whether the company may be restored to solvency. This stage includes an initial registration of all creditors' claims. During the period of supervision, certain restrictions are imposed with respect to creditors' rights to take enforcement action against the company and the company's ability to discharge certain claims. Most of these restrictions also extend to the other stages of insolvency described below:

The interim administrator is approved by the insolvency court following nomination by the petitioner or by selection from a list of candidates presented by the self-regulatory organisation of insolvency administrators (SRO) proposed by the petitioner in its insolvency petition. If the petitioner is a debtor, the interim administrator is approved by the insolvency court from a list of candidates presented by the SRO nominated by the debtor, which is determined in a casual manner that has yet to be established by the government (before the relevant governmental regulation is adopted, the insolvency administrator is to be nominated by the debtor). During the supervision stage, the company's management remains in place (although with restricted authority) and the first creditors' meeting must be held, which, *inter alia*, should decide on the next stage of insolvency to which the company will move upon the direction of the court after completion of supervision. On conclusion of the supervision and on the basis of the decision of the first creditors' meeting, the court must issue one of the following rulings:

a to declare the debtor bankrupt and to commence liquidation;
b to commence financial rehabilitation;
c to commence external administration; or
d to approve a voluntary arrangement and terminate the bankruptcy proceedings.

The financial rehabilitation stage is primarily aimed at restoring the company's solvency and the satisfaction of creditors' claims in accordance with a debt repayment schedule. Financial rehabilitation is not a compulsory insolvency proceeding and is instigated by the insolvency court at the petition of either the first creditors' meeting or, in the absence of such petition, of the company's shareholders or other persons willing to put up collateral for the company's debts.

In the course of rehabilitation a debt repayment schedule must be drawn up under which all registered claims are to be satisfied according to the statutory order of priority no later than one month prior to the end of the stage, and first and second-ranked claims are to be satisfied within six months of the date of commencement of rehabilitation.

If financial rehabilitation is successful, the company emerges from the insolvency proceedings; if not, the insolvency court will move to liquidation unless, to the extent the length of financial rehabilitation allows, there are grounds to move to the external administration procedure described below. Implementation of the debt repayment schedule and the plan for financial rehabilitation (which is drawn up if collateral supporting the debt repayment schedule was not provided) is supervised by an administrator that is approved by the insolvency court following nomination by the creditors' committee or selection from a list of candidates presented by the SRO proposed by the creditors' committee; however, the company's management again remains in place (although its authority is more restricted than at the supervision stage).

Financial rehabilitation can last up to two years.

The third stage, external administration, is not a compulsory insolvency proceeding and is generally instigated by the insolvency court at the petition of the creditors' meeting. It involves the appointment of an external administrator to collect debts, make an inventory of assets and prepare a plan for restoring solvency (to be approved by a majority of creditors voting at a creditors' meeting).

External administration commences if there is a real possibility of restoring the company's solvency within the set time limits; if following financial rehabilitation, it may only be commenced if no more than 18 months have passed since the financial rehabilitation's commencement.

The company's management is removed by the insolvency court, and management power is vested in the external administrator. An external administrator is approved by the insolvency court under the same procedure as that applicable to financial rehabilitation.

Subject to a limitation on the aggregate duration of financial rehabilitation and external administration, external administration can last up to 18 months but may be extended by a further six months on the petition of the majority of registered creditors voting at a creditors' meeting.

Liquidation is the final stage of formal insolvency proceedings. A Russian company may generally enter into liquidation if the insolvency court determines that the company shows 'signs of insolvency' and there are no grounds to instigate any recovery stages of insolvency (i.e., financial rehabilitation and external administration), approve a voluntary arrangement, or terminate insolvency proceedings or dismiss an insolvency petition.

In addition, the company may enter into liquidation if the creditors' meeting:

a petitions at any stage of insolvency to have the company declared bankrupt and for the commencement of liquidation;

b fails to approve the solvency plan within four months of the date of commencement of external administration;

c rejects the solvency plan and petitions for liquidation; or

d on the basis of the report of the external administrator, fails to take either a decision resulting in termination of insolvency proceedings or a decision on commencement of liquidation, if the insolvency court was petitioned for commencement of liquidation and the maximum time limit for external administration has expired.

Liquidation starts by declaring the company bankrupt and involves the appointment by the insolvency court of a liquidator to realise the company's assets and to satisfy its debts in accordance with the statutory order of priorities. The liquidator is approved by the insolvency court under the same procedure as that applicable to the administrator in financial rehabilitation and replaces the management of the company.

Upon commencement of liquidation, all debts are deemed due, all assets are consolidated in a pool comprising the bankrupt estate (although secured assets are accounted for separately within the pool), and all bank accounts are consolidated into a single account except for a 'special account', which is to be established for the purposes of collecting proceeds from the sale of pledged property, and 'secured' accounts subject to a pledge of rights over the debtor's bank accounts.

The liquidation lasts for up to six months, although such time frame may be extended by a further six months; in practice, it may be extended even further, although such longer period is not prescribed by the Insolvency Law.

In practice, in the majority of Russian bankruptcy proceedings, liquidation would be the next stage after the supervision stage, and it is quite rare for debtors to go through the financial rehabilitation or external administration stages.

Voluntary arrangements can be entered into at any stage of insolvency proceedings. A voluntary arrangement is a court-sanctioned agreement pursuant to which a company may exit insolvency proceedings.

The creditors' meeting can petition for a voluntary arrangement upon approval by a majority of creditors whose claims are included in the register of creditors, and with the unanimous consent of those creditors whose claims are secured by pledge or mortgage over the debtor's assets.

To be legally binding, a voluntary arrangement must be approved by the insolvency court, and the court may approve it only if it satisfies the unsecured claims of the first and second-ranked creditors and current claims.

A voluntary arrangement binds the company and the creditors whose claims were included in the register of creditors (irrespective of whether they voted against such arrangement or did not vote). From the date of court approval of the voluntary arrangement, the insolvency proceedings terminate and the debtor is obliged to start repayment of creditors' claims in accordance with the repayment schedule set out in the voluntary arrangement.

Existing security (in fact, only pledges or mortgages) over the debtor's assets is retained to secure claims of secured creditors under the voluntary arrangement, unless otherwise provided in the voluntary arrangement.

Effects of insolvency

Once insolvency proceedings are commenced (i.e., the supervision stage has been instigated) the insolvent company can only discharge its non-current debts (claims that arose before the opening of insolvency proceedings) in accordance with the statutory order of priorities. In particular, upon instigation of supervision:

a creditors' claims other than current claims (i.e., claims that arose after the opening of insolvency proceedings) may be presented only in accordance with the procedure prescribed by law;

b for the purposes of participation in insolvency proceedings and inclusion of creditors' claims in the register, claims that arose on or before the acceptance by the insolvency court of a insolvency petition are deemed automatically due and payable;

c any debt recovery proceedings and steps to enforce against the company's assets are suspended (except where enforcement is sought under enforcement orders for employment claims, claims for harm inflicted to health or life, claims for moral damages (mental suffering), claims for recovery of property from the debtor's unlawful possession and certain other claims);

d all claims for the purposes of inclusion in the register of creditors' claims are converted into roubles at the exchange rate set by the Russian Central Bank at the date of commencement of the insolvency stage following the maturity of such claim;

e interest on claims registered during the supervision stage and during each other stage of insolvency accrues at the Central Bank refinancing rate as of the date of the commencement of supervision;

f fines, penalties or any default interest do not accrue for non-performance or improper performance of monetary obligations and the mandatory payments (except for current claims);

g enforcement of pledges and mortgages is prohibited at this stage;

h set-off against the debtor's claims is prohibited if it would breach the statutory order of priority, or such discharge results in the preferential satisfaction of claims of one creditor over another;

i any contractual subordination in respect of a claim against an insolvent Russian company is unlikely to be effective notwithstanding recently adopted changes to the Civil Code that introduced a concept of contractual subordination (with effect from 1 June 2015); and

j any payment of dividends to shareholders and other payments to holders of issued securities is prohibited.

Creditors' meeting

Creditors have a say on the key matters concerning the insolvency process by participating in the creditors' meetings. Generally, the creditors' meeting has exclusive competence on matters including:

a approval of additional criteria for nominees for the positions of insolvency administrator at different stages of insolvency;

b approval of any voluntary arrangement to be submitted to the court; and

c determining what would be the next stages of insolvency (i.e., either to petition the court to declare the company bankrupt and commence liquidation, or to proceed with pre-liquidation insolvency proceedings that may end up with the restoration of solvency of the company and termination of insolvency proceedings).

Creditors vote at the creditors' meeting in proportion to their registered claims (in each case, excluding the amount of any claim for fines, penalty interest, damages and other financial sanctions). Decisions are generally adopted by a simple majority of votes of creditors attending the meeting (provided that at least half of the registered creditors by claims were present at such meeting), although decisions on certain matters must be adopted by a majority of the total number of registered votes (e.g., on commencement of further stages of insolvency and extension of the term of such stages, on conclusion of a voluntary arrangement).

The decision of the majority creditors will be binding on the minority creditors, but the company cannot influence any such decision and in this sense no true 'cram down' is available. The validity of decisions can be challenged in a court.

Satisfaction of creditors' claims in insolvency

Unsecured claims

At the liquidation stage (where all creditors' claims are subject to satisfaction), the satisfaction of unsecured monetary claims against the insolvent company is generally subject to the following statutory order of priority:

a claims for harm to health or life, and claims for moral damages (mental suffering);

b employment claims (wages and severance payments) and royalty claims under copyright agreements; and

c all other claims, including claims of secured creditors to the extent their claims are not discharged out of the proceeds of a sale of secured assets or the value at which the secured assets were appropriated by the secured creditor.

Settlement of claims in the foregoing order of priority is conducted in accordance with the register of creditors' claims, and claims submitted after the closing of the register of creditors are satisfied only after the discharge of all registered claims.

Shareholders' claims

Generally, shareholders with shareholder loans are treated as other creditors. Equity claims of shareholders may not, however, be satisfied in insolvency proceedings, and may be satisfied only upon liquidation of a company if any assets remain after all creditors have been paid in full.

ii Taking and enforcement of security

The Insolvency Law expressly recognises only a pledge or mortgage as giving the holder the status of a secured creditor, and it is therefore unclear what status, if any, would be afforded by other forms of security.

Claims of secured creditors

Claims secured by a pledge or mortgage over the company's assets are settled out of the proceeds of sale of such assets in priority to all other claims, subject to a requirement to allocate part (20 to 30 per cent, depending on the nature of the claim secured) of the proceeds to discharge claims with the statutory priority of the first and second ranks, and certain current claims.

The secured property is generally subject to a sale at auction. If two auctions fail and the property is not sold, the secured creditor may elect to appropriate the secured property, in which case it must transfer 20 or 30 per cent, as appropriate, of the value of the property at which it was appropriated to a 'special account' for the purposes of satisfaction of the above statutorily prioritised claims. If the secured creditor does not appropriate secured property, the pledge terminates.

To the extent unsecured claims with the statutory priority of the first and second ranks are satisfied, the remaining proceeds of sale of the secured property are paid to the secured creditors. If the secured claim is discharged in full, the remaining proceeds are routed to the satisfaction of outstanding current claims and the balance is channelled towards the discharge of third-ranked creditors' claims.

Voting rights of secured creditors

Under the Insolvency Law, secured creditors have been expressly granted a right to vote at a creditors' meeting during:

a supervision; and

b financial rehabilitation and external administration, if the secured creditor decided against the sale of secured property during these stages or if the insolvency court rejects the sale of secured property on the enforcement of the relevant pledge or mortgage.

Secured creditors that do not have a voting right can still participate in and speak at creditors' meetings.

Based on the clarifications of the Russian Supreme Arbitrazh Court, secured creditors still have voting rights with respect to voluntary arrangements (where a unanimous vote of all secured creditors is required) at the liquidation stage (where, generally, secured creditors do not have voting rights) and arguably at the earlier stages of insolvency when the secured creditors generally do not have voting rights (i.e., when their right to enforce security was not rejected or they have not refused to enforce it).

According to the recent amendments to the Insolvency Law, secured creditors have been expressly granted the right to vote at a creditors' meeting on the following matters:

a election of an administrator or SRO;

b petition to the bankruptcy court on removal of the administrator; and

c petition to the bankruptcy court on termination of liquidation and commencement of external administration.

iii Duties of directors of companies in financial difficulties

The Insolvency Law imposes a general duty on a company's chief executive officer (CEO) to act in accordance with the Insolvency Law (to follow the rules on satisfaction of creditors' claim, comply with moratorium, etc.). In addition, the Russian Civil Code imposes a direct statutory obligation on directors to act reasonably in the best interests of the company.

Liability

Management and shareholders' liability

Liability of 'controlling persons'[3] (including directors) and shareholders in the event of a company's insolvency are regulated by a number of Russian laws. Depending on the type of action and its gravity, a director or a shareholder (participant) may be subject to civil, administrative or criminal liability.

Civil liability

If insolvency of a company is caused by the shareholders (participants) or other persons who have the right to give binding instructions to such company or otherwise are able to determine the actions of the company, such persons can bear subsidiary liability for the company's obligations if the assets of the company are insufficient to discharge the debtor's obligations. Apart from limited liability companies in relation to which the liability of controlling persons is not restricted by any subjective test, the scope of the potential liability of controlling persons with respect to joint stock companies is restricted to situations in which such controlling persons have used their right to give binding instructions, or used their influence, to determine the actions of the company for the purpose of the company taking an action, knowing in advance that such action would entail the company's insolvency.

Liability of controlling persons

In addition to the general liability envisaged by civil legislation, the Insolvency Law sets out the specific grounds and the level of liability of the company's management, shareholders and other controlling persons for the company's debts.

3 For the purposes of the insolvency legislation, a controlling person means a person who, within the two years prior to the commencement of insolvency proceedings, has or had the right to give binding instructions to the debtor, or otherwise is or was able to determine the debtor's actions. The Insolvency Law expressly provides that 'controlling persons' include members of the debtor's liquidation commission; the debtor's authorised representatives (whether authorised by virtue of a power of attorney, regulation or special authorisation); and persons (entities) that had the right 'to dispose of 50 per cent or more' of the voting shares (in the case of a joint stock company) or more than 50 per cent of participatory interest (in the case of a limited liability company).

The shareholder and management, as well as other 'controlling persons', of a Russian debtor that was declared bankrupt could jointly and severally bear secondary liability for the monetary claims of creditors (including current claims) against, and mandatory payments due from, such debtor, when simultaneously, the insolvent debtor has acted on instructions from the controlling persons; such actions resulted in 'harm to creditors' rights'; and the insolvency estate is insufficient to satisfy the creditors' claims, mandatory payments and current claims.

Russian courts may, at their discretion, reduce the liability of controlling persons if the losses caused by the debtor acting on the controlling persons' instructions are disproportionately lower than the amounts claimed by the creditors. Furthermore, controlling persons are exempt from liability if they can prove that they acted in good faith and reasonably in the interests of the debtor.

In a situation in which the accounting or reporting documentation of the debtor that is required to be produced by Russian law appears to be missing, or the relevant information on the assets and liabilities of the debtor and their movement appears to be incomplete or untrue, in each case as of the date of instigation of the supervision stage or declaration of the debtor's insolvency, the CEO of the debtor also bears secondary liability for the obligations of the debtor.

In addition to the above, the persons (generally, the CEO and a liquidator, as appropriate) who failed to file for the company's insolvency when obliged to do so by law (e.g., in cases where a company meets certain insolvency tests) may bear secondary liability for new debts of the company arising after the date on which the insolvency petition should have been filed.

Administrative and criminal liability

A CEO or founders of a company may face criminal or administrative liability for acts such as fraudulent insolvency, deliberate insolvency, concealing property during insolvency proceedings and unlawful satisfaction of creditors' claims.

iv Clawback actions

In addition to certain transactions that are prohibited or restricted at each stage of insolvency and that, if entered into in violation of such restrictions may be challenged by an insolvency administrator, there are specific transactions that may be challenged in insolvency if entered into during suspect periods prior to the opening of insolvency proceedings.

Generally, the following two specific types of transaction can be challenged by an insolvency administrator in the insolvency court at the stage of external administration or liquidation: 'suspicious' transactions, which include transactions 'at an undervalue' and transactions 'aimed at defrauding creditors'; and preferential transactions.

Transactions 'at an undervalue' are transactions in which the consideration received or to be received by the debtor is 'inadequate'.[4] Transactions 'at an undervalue' may be challenged if entered into or performed within the year preceding, or at any time after, the opening of insolvency proceedings.

4 If, for example, the market value of the transferred assets is significantly higher than the consideration received or to be received, taking into account the circumstances of the transaction, including where the price or other terms of such transaction are materially less

Transactions aimed at defrauding creditors are treated as such if the following conditions are simultaneously met:

a the purpose of the transaction was to prejudice the rights of creditors (such purpose is presumed, *inter alia*, if at the time of entry into the transaction the debtor was unable to pay its debts or the liabilities of a debtor exceeded the value of its assets and no consideration was paid to the debtor, or the transaction was with an 'interested party'[5]);

b such transaction resulted in infliction of 'harm to creditors' rights' (such transaction or action resulted in a decrease of the value or the size of the debtor's assets an increase of the value of claims against the debtor, or other consequences that entail or could entail the inability of creditors to satisfy their claims (whether in full or part) from the debtor's assets); and

c the counterparty knew or should have known of the above purpose of the transaction at the time of entry into such transaction (an 'interested party' is presumed to know of such purpose).

Transactions aimed at defrauding creditors may be challenged if entered into or performed within the three years preceding, or at any time after, the opening of insolvency proceedings.

Preferential transactions are transactions that result or may result in preferential satisfaction of a claim of a particular creditor over other creditors, including but not limited to one of the following transactions:

a granting of security or guarantees for pre-existing indebtedness;

b transactions that may alter the ranking of creditors' claims that arose before the entry into of such transaction;

c transactions that will or may result in the satisfaction of unmatured claims of creditors where the debtor has failed to satisfy its matured claims; or

d transactions that provide or may provide more priority in satisfaction of a creditor's claims that arose before the entry into of such transaction when compared with the priority to be given to such claims if their settlement was exercised according to the statutory ranking of creditors in insolvency.

Preferential transactions may be challenged if entered into or performed within the month preceding, or at any time after, the opening of insolvency proceedings. However, preferential transactions falling within both (a) and (b) above, or falling within any of the above where the counterparty knew of the debtor's inability to pay or that the debtor's liabilities exceeded the value of its assets are subject to a six-month suspect period. A counterparty that is an 'interested party' is presumed (unless proved otherwise) to have such knowledge.

A claim for the invalidation of a transaction in insolvency can be brought to the insolvency court by the liquidator or external administrator of a debtor either at his or her own discretion or when instructed by a creditors' meeting or committee. The recent amendments to the Insolvency Law also entitle a creditor and government agency to bring a claim for the invalidation of a transaction if the amount of the claim of such creditor or

---

favourable than those of comparable transactions concluded in comparable circumstances.

5 Interested parties include, *inter alia*, the CEO of the debtor and its directors as well as affiliates and companies comprising the 'group of entities' to which the debtor is attributable.

government agency exceeds 10 per cent of the total amount of indebtedness included in the register of creditors' claims (disregarding the amount of the claim of the creditor whose transaction is being challenged or any claim of its affiliates).

When voting at the creditors' meeting to decide whether a vulnerable transaction with a creditor or any of its affiliates is to be challenged, the votes of such creditor shall be disregarded.

Everything received under a successfully challenged transaction will be subject to clawback (and all assets disposed of by the debtor under such transactions are to be returned to the bankrupt estate).

III RECENT LEGAL DEVELOPMENTS

At the end of 2014, a set of amendments to the Insolvency Law was adopted. There has been a change in the procedure for the appointment of the administrator in cases where the petitioner for bankruptcy proceedings is a debtor. In such case, the interim administrator is approved by the insolvency court from a list of candidates presented by the SRO nominated by the debtor, which is determined in a casual manner that is yet to be established by the government.

Furthermore, creditors that are financial institutions can now file for debtor's insolvency through a 'simplified regime' without first obtaining a court judgment or arbitral award recognising the claim. The filing can be made against a debtor evidencing signs of bankruptcy (i.e., a due debt outstanding for more than three months). The only requirement is that the bank creditor making the relevant filing must first publish in the publicly available special state register information about legal entities at least 15 calendar days prior to the date of the actual filing. Such simplified procedure has been already tested, including in one of the most notable potential bankruptcy cases in Russia relating to Mechel.

It has been queried whether foreign banks would have the benefit of the simplified bankruptcy process outlined above, or whether this would be available only to Russian banks – this point is something that was not made clear in the amendments to the Insolvency Law. However, it would seem logical that foreign banks should benefit from the same treatment as Russian banks. Such a position was recently supported in a case in the lower Russian courts where a European bank was recognised as being eligible for the simplified bankruptcy filing on the basis of a banking licence and a letter issued by the relevant regulator in the jurisdiction of incorporation of such European bank confirming that it may conduct banking operations in its home jurisdiction.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

As noted above, depressed commodity prices and heavy debt burdens have prompted some of the major players in the metals and mining sectors to approach their creditors with requests to restructure their debts or extend maturities.

Amurmetal, a major metals production factory in the Russian Far East, is currently in the liquidation stage, with an auction on the sale of its assets ongoing. Market players have very little confidence that it will be able to recover.

Mechel, the Russian coal and steel giant, is another major player that continues to have to contend with a heavy debt burden. With its total debt standing at approximately

US$8 billion, Mechel has reportedly already undergone several restructurings with its creditors, but is as yet far from reaching a consensus with the banks. As a result Mechel, continues to face potential bankruptcy filings from its major creditors, including VTB and Sberbank, which have already made the relevant announcements in the state register as a preliminary step in anticipation of possible bankruptcy filings.

Another industry seeing restructurings is aviation: two major Russian companies, Transaero and UtAir, are experiencing longstanding financial difficulties, and are seeking state support to ensure a restructuring proposal can be reached with their bank creditors.

V INTERNATIONAL

Russian insolvency proceedings can generally be commenced only in relation to Russian-registered companies. It is also possible that a Russian court would recognise decisions on insolvency proceedings in relation to a foreign entity issued by a foreign court (e.g., a decision of a foreign court restricting the disposal of property located in Russia and owned by a foreign entity against which insolvency proceedings have been commenced outside Russia). Recognition by the Russian court of a decision of a foreign court could in theory be either on the basis of an international treaty (although at present there are no treaties relating to insolvency to which Russia is a party) or on the basis of the principle of reciprocity (although there is no established court practice on this point).

VI FUTURE DEVELOPMENTS

The State Duma is considering adopting some amendments to the Insolvency Law to change the order of satisfaction of the claims of third-priority creditors. It is expected that the following four priorities will be provided within the third-priority creditors' category:

a creditors with claims for monetary obligations (principal and interest) accrued prior to the date of commencement of supervision;

b claims for payments of the mandatory payments to the extent they relate to the principal thereof;

c other claims for monetary obligations and compulsory payments relating to the interest accrued during the bankruptcy proceedings; and

d claims of creditors for losses and penalties and other financial sanctions.

In addition, a draft law amending the Law on Insolvency (Bankruptcy) is being discussed. According to this draft, it is expected that entry into intercreditor agreements during the insolvency proceedings will be permitted. Such intercreditor agreements will regulate the order of satisfaction of creditors' claims in the insolvency of the debtor. At present, entry into intercreditor agreements is generally allowed under the recent amendments to the Civil Code of the Russian Federation.

Separating financial rehabilitation from the bankruptcy proceedings has also been proposed in order to make financial rehabilitation a special procedure preceding bankruptcy that can be applied on the petition of the debtor. As part of the proposal, it would be possible for the debtor to enter new loan agreements and other transactions during this initial stage without the consent of the creditors' meeting.

The term of the supervision stage is expected to be shortened to two months, with the possibility of prolonging the stage for one extra month.

Appendix 1

ABOUT THE AUTHORS

VLADIMIR BARBOLIN
Clifford Chance
Vladimir Barbolin joined the Moscow office of Clifford Chance in 2001 and has been a counsel of the finance practice since 2008. He has also spent time in the real estate finance team in the London office of the firm. He specialises in cross-border finance, and his expertise includes pre-export finance, syndicated lending, insolvency and restructuring, secured and unsecured facilities, real estate finance and structured finance.

ADAM FADIAN
Clifford Chance
Adam Fadian is a counsel in the Moscow office of Clifford Chance. He specialises in debt restructuring, insolvency and workouts, structured trade and commodity finance, syndicated lending and acquisition finance. He has been active in the Russian market for more than seven years, and his industry expertise includes metals and mining and oil and gas.

CLIFFORD CHANCE
ul Gasheka 6
125047 Moscow
Russia
Tel: +7 495 258 50 50
Fax: +7 495 258 50 51
vladimir.barbolin@cliffordchance.com
adam.fadian@cliffordchance.com
www.cliffordchance.com