

RUSSIAN COMPANIES ARE ENTITLED TO WAIVE INSOLVENCY MORATORIUM GRANTED TO THEM BY THE STATE

As outlined in our previous [briefing](#), amendments to the Russian Law on Insolvency (Bankruptcy) came into force on 1 April 2020 setting out the rules for the introduction of a moratorium by the Russian Government on the filing of creditors' petitions for insolvency of Russian companies (and excluding the obligation for a company to file for its own insolvency) (the "**Moratorium Rules**") and establishing restrictions on certain operations of the companies subject to the moratorium. On 6 April 2020 the Government determined the list of companies subject to the moratorium (by reference to particular business sectors mostly affected by Covid-19 and to lists of specifically named strategic companies and companies systemically important for the Russian economy) which will be subject to the moratorium as outlined in detail in our previous [alert](#).

On 24 April 2020 further amendments to the Moratorium Rules came into force (the "**Clarifying Amendments**")¹ in an attempt to clarify the ambiguities with respect to the companies to which the moratorium (and the related restrictions) should apply and to exclude from the previously adopted rules the most controversial provisions affecting transactions of the companies during the moratorium.

Background and consequences of the right to waive the benefits of the moratorium

According to the Moratorium Rules, although companies subject to the moratorium were protected from being put in insolvency proceedings by their creditors, certain restrictions were introduced in order to prevent a decrease in the value of the company's assets and to give the creditors some of the protection which they would otherwise have had by initiating insolvency

Key issues

- a company may waive the benefits of the moratorium entirely
- any waiver of the moratorium must be published in the unified federal bankruptcy register to be effective
- following the waiver, the restrictions introduced by the moratorium will not apply
- transactions entered into during the moratorium will not be deemed void if an affected company is put into insolvency after the end of the moratorium
- transactions entered into during the moratorium continue to be vulnerable under the general insolvency rules if insolvency proceedings are commenced shortly after the end of the moratorium

¹ Art. 3 of the Federal Law No. 149-FZ of 24 April 2020 "On amendments to certain legislative acts of the Russian Federation".

proceedings against the company. These restrictions include a prohibition on the payment of dividends, non-accrual of financial sanctions on overdue payments, a prohibition of set-off which could breach the statutory order of priority, a prohibition on enforcement of pledges over the company's assets and the suspension of debt recovery enforcement proceedings on certain claims.

These restrictions raised reasonable concerns for the companies which technically fell within the scope of the moratorium, including where they did not apply to the Government for the relevant protection and where they did not show any signs of insolvency. It was unclear from the Moratorium Rules whether the affected companies were subject to the relevant restrictions during the moratorium period or whether they first needed to meet any insolvency criteria for the restrictions to start applying. The counterparties of such companies also had serious concerns about the moratorium.

According to the Clarifying Amendments as of 24 April 2020 a company within the scope of the moratorium is given the right to waive the benefits of the moratorium entirely. If the moratorium is waived, not only may insolvency be initiated against the company by any eligible creditor, but the restrictions and other limitations and rules otherwise applicable during the moratorium will not apply. This waiver is to be reflected in the unified federal register of information on bankruptcy which is searchable online and will be effective from the date when the waiver is officially published in the register. However a risk remains that companies determined by the Government as those to which the moratorium applies and which do not waive their right to avail themselves of the protection provided by the moratorium will be subject to the moratorium restrictions irrespective of their real financial condition (i.e. without needing to demonstrate signs of insolvency).

Status of transactions entered into during the moratorium

The Moratorium Rules also contained a provision that has been the cause of considerable concern to the effect that if insolvency proceedings are initiated against an affected company within 3 months following the end of the moratorium, any transactions connected with the disposal of assets and giving rise to obligations on the part of the company during the moratorium (other than a transaction (or interrelated transactions) in the ordinary course of business with respect to assets or obligations the value of which does not exceed 1% of the company's asset value) will be deemed to be void. This provision puts almost all transactions of companies benefiting from the moratorium at risk of being invalid depending on an event that may occur in the future (whether or not a company can recover from its difficult financial situation when the moratorium is ended) which is outside the counterparties' control and irrespective of whether counterparties act in good faith. This could jeopardise the business activity of the company during the moratorium, undermine steps taken to ensure recovery of the relevant companies and frustrate the moratorium measures.

The Clarifying Amendments have abolished the above rule on deeming transactions of a company subject to the moratorium void (with retroactive effect for transactions entered into before the Clarifying Amendments became effective). We note however that the transactions of affected companies will be scrutinised during the moratorium period under the general rules of

insolvency law applicable to transactions with preferential satisfaction of creditors' claims and as suspicious transactions (i.e. entered into at undervalue or with prejudice to the interests of other creditors) and may be challenged if insolvency is initiated within 3 months from the end of the moratorium under the extended suspect periods. Such transactions may be challenged if entered into within the suspect periods set by the insolvency law for each type of transaction, but these suspect periods will be calculated by reference to the date of introduction of the moratorium (rather than by reference to the date of commencement of insolvency proceedings as applied generally) and will additionally include the moratorium period and the period until initiation of insolvency after the end of the moratorium (arguably 3 months after the end of the moratorium).

In this briefing we have focused only on those issues which were addressed by the Clarifying Amendments. However, due to the novelty of the regime introduced by the Moratorium Rules other issues are arising and are expected to arise in the course of their application in practice. We will continue to monitor the implications of the moratorium on our clients' business and further legislative developments on this topic. Should you have any questions as to how the new rules may affect your business or what impact they have on transaction documentation, please contact the authors of this briefing and your usual Clifford Chance contacts who are available at any time for specific advice.

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