Impact of Anti-COVID-19 Moratorium on Derivative Transactions

As outlined in our earlier alerts [1, 2], on 1 April 2020 the amendments to the Law on insolvency (Bankruptcy) setting out the rules for introducing a moratorium on the filing of bankruptcy petitions by creditors of Russian companies ("First Amendments"). By these First Amendments the Government was vested in with a power to introduce such moratorium (including a power to determine the sectors of business and specific entities subject to the moratorium and a period for such moratorium). On 3 April 2020 the Government exercised this power and issued Decree No. 434 introducing the moratorium ("Moratorium") on the filing of creditors' petitions for bankruptcy of the specified list of sectors of business and particular companies and determined that such moratorium is set for six month from the date of the official publication of the resolution (i.e. till 6 October 2020), but the Government has the power to extend it if necessary. Finally, on 24 April 2020 further amendments to the Law on insolvency (Bankruptcy) were adopted, introducing important corrections to the regime of Moratorium ("Second Amendments"). While the Moratorium imposes wide range of protections for, and restrictions in respect of, the business of the entities covered by the Moratorium, this briefing focuses on the key impact the Moratorium (as amended by the Second Amendments) may have on derivative transactions.
Key Restrictions Imposed by Moratorium

Restrictions on filing insolvency petitions

The introduction of the Moratorium implies that:

- creditors are not allowed to file insolvency petitions in respect of entities covered by the Moratorium; and

- equally, entities covered by moratorium will be exempt from the obligation to file for its own insolvency in circumstances where other non-exempt companies are required to do so by law (however, they may still file voluntary petition for bankruptcy).

Restrictions on Transactions and Enforcement

Moratorium also imposed certain restrictions on activity of, and provided certain protections to, entities covered by the Moratorium. In particular:

- set-off against the company's claims is prohibited if it would breach the statutory order of priority;

- enforcement of pledges and mortgages (whether through the courts or without recourse to the courts) is prohibited; and

- any debt recovery proceedings on claims which arose before the introduction of the moratorium are suspended (but any attachment of the company's assets and other restrictions on disposal of assets imposed in the execution proceedings are not lifted).

In addition, according to the First Amendments, if insolvency proceedings are initiated against a company covered by the Moratorium within 3 months following the end of the moratorium, then, among other things, (i) any transactions connected with the disposal of assets and giving rise to obligations on the part of the company during the moratorium, other than 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 deemed to be void ("invalidation of transactions"); and (ii) the calculation of suspect periods preceding the opening of insolvency proceedings when preferential transactions, transactions at an undervalue and transactions aimed at defrauding creditors
may be challenged is changed to take into account the moratorium period.

However, the Second Amendments introduced two important corrections to the regime of Moratorium:

- an entity covered by moratorium can waive protections granted by moratorium by filing relevant declaration with Unified Federal Register of Insolvencies (and if it does, this would completely disapply the Moratorium to such entity); and

- The provisions on invalidation of transactions during the moratorium was completely abolished with retroactive effect, which eliminated most of the concerns that have arisen after the Moratorium was originally introduced.

Impact of Moratorium on Derivative Transactions

In light of the above, the potential concerns may be arising if your counterparty (i) is an entity which is covered by the Moratorium according to the Governmental Decree №434, and (ii) has not waived the Moratorium according to the Second Amendments. In particular, in the context of derivative transactions the following needs to be specifically considered:

- the prohibition of set-off during the Moratorium may mean that (a) the validity of payment netting under multiple transactions and (b) the ability to terminate all the transactions and calculate the Early Termination Amount may be put in question;

- if insolvency proceedings against an entity covered by the Moratorium are opened within three months after the expiry of the Moratorium, then the suspect periods for challenging the transactions by the insolvency administrator would start running from the date the Moratorium started to apply to that entity (and not from the dates of opening the bankruptcy proceedings/introduction of temporary administration, which are the standard dates from which the suspect periods are counted absent the Moratorium).

Finally, even if your counterparty is either not covered by the Moratorium or has duly waived it, it does not mean that it would be covered by any future amendments to the lists of companies protected by the Moratorium (which is in the discretion of the Government). Thus, given that Moratorium
gives rise to issues discussed above, you may want to consider including into master agreements provisions allowing for automatic early termination of all transactions if a counterparty becomes protected by the Moratorium and does not waive these protections within mutually acceptable time-frames.

Should you have any queries about the measures described above or if you would like to discuss how the above changes may impact your business, please contact the authors of this alert or your usual Clifford Chance contacts to address your concerns.

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