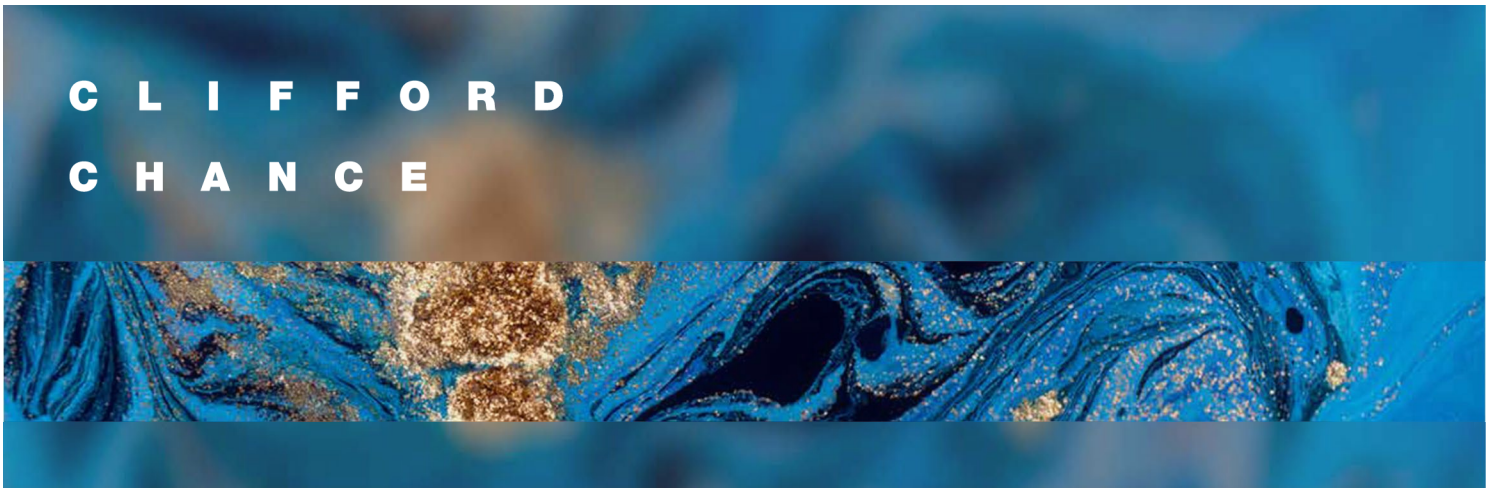

SPAIN CORONAVIRUS: INSOLVENCY MEASURES

Until now, the impact of the coronavirus health crisis on insolvency proceedings had been dealt with in a very limited way in Spanish legislation, by means of a measure set out in Spanish Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to address the economic and social impact of COVID-19 ("**RDL 8/2020**") permitting the debtor to defer its duty to apply for insolvency while the State of Emergency is in force and, as a consequence of this rule, providing protection for the debtor against an application for insolvency filed by the its creditors, until two months after the State of Emergency ends.

Royal Decree-Law 16/2020, of 28 April, on procedural and organisational measures to address COVID-19 as it affects Justice Administration ("**RDL 16/2020**") introduces a series of measures relating to insolvency, which on the one hand are designed to maintain economic activity, avoiding insolvencies, and on the other hand attempt to avoid liquidations and expedite the process of insolvency proceedings already underway.

RDL 16/2020 entered into force on 30 April 2020.

1. MEASURES DESIGNED TO AVOID INSOLVENCIES

RDL 16/2020 puts in place a series of measures designed to avoid insolvencies. To do so, it necessarily relaxes the obligatory duties of company directors when an insolvency situation occurs, extending the term available to them to apply for insolvency.

Moreover, RDL 16/2020 facilitates access to the financing granted by specially related persons.

Finally, RDL 16/2020 facilitates compliance with any refinancing agreements in force.

a. Suspension of the duty to apply for insolvency until 31 December 2020

Debtors facing insolvency will not be required to file for insolvency until 31 December 2020, regardless of whether or not they have filed the notification of pre-insolvency at court established under Article 5 bis of the Spanish Insolvency Act (*Ley Concursal*)) (the "**5 bis Notification**").

Consequently, applications for insolvency filed by creditors during the State of Emergency will not be given leave to proceed until that date either. In the meantime, those applications for insolvency filed by the debtor itself will be given preference, even if dated later.

If the 5 bis Notification is filed prior to 30 September 2020, the general regime of the Insolvency Act will apply, meaning that the debtor must file for insolvency prior to 30 January 2021, if it has not succeeded in remedying its insolvency situation.

If the ordinary term for applying for insolvency (two months) is counted as of 1 November 2020, the debtor will have two months in which to apply for insolvency, as it would make no sense for these measures recently approved to shorten the term available to debtors, forcing them to file for insolvency prior to 31 December.

a. The treatment of financing granted by specially related persons

Financing granted by an entity or individual specially related to the debtor within a period of two years following the declaration of the State of Emergency will be considered ordinary credit.

It is not clear from the wording of RDL 16/2020 whether such regulation sought to avoid the subordination of these credits, or alternatively, to classify them in any case as ordinary credits. The main uncertainty is whether the credit granted by a specially related person which includes an *in rem* guarantee (and which would be cancelled pursuant to Article 97.2 of the Insolvency Act) would now be deemed a preferential credit. The wording of Article 12.2 of RDL 16/2020 seems to indicate that the system for the cancellation of guarantees remains in force. Otherwise, it would not state that ordinary or *preferential* credits subrogated by a specially related person will be considered ordinary liabilities.

b. Refinancing agreements

RDL 16/2020 introduces certain measures addressed to those debtors that have already entered into a refinancing agreement.

During the one-year period following the declaration of the State of Emergency (i.e. until 14 March 2021), these debtors can request the homologation (i.e. court approval) of a new refinancing arrangement or file the 5 bis Notification, even if a year has not elapsed since the previous homologation request.

During the six-month period following the declaration of the State of Emergency (i.e. until 14 September 2020), the judge will not give leave to proceed to any requests submitted by creditors for refinancing agreements to be declared in default, but rather will merely notify such requests to the debtor. The debtor is granted a period of one month (i.e. until 14 October 2020) to file the 5 bis Notification or to reach a new agreement, even if a year has not elapsed since the previous request for homologation. If the debtor fails to reach an agreement within the three months after filing its 5 bis Notification at court, the judge will give leave to proceed to the creditors' requests for the refinancing agreements to be declared in default.

2. MEASURES RELATED TO INSOLVENCY PROCEEDINGS ALREADY UNDERWAY

RDL 16/2020 also introduces a series of measures relating to insolvency proceedings which are already underway, aimed at avoiding liquidations and expediting the process.

a. Amendment of the insolvency arrangement and out-of-court payment agreements

In order to avoid the declaration of default, debtors will have the option to present a proposal for the amendment of the existing insolvency arrangement, during the year following the declaration of the State of Emergency.

In the six months following the declaration of the State of Emergency, any requests for the insolvency arrangement to be deemed breached will be notified to the debtor so that it is able to propose an amendment of such arrangement, which would be given priority.

b. Deferral of the duty to apply for the commencement of the liquidation stage

During the one-year period following the declaration of the State of Emergency, the debtor will not be required to apply for the commencement of the liquidation of assets stage when it is aware that it will be impossible to meet the payments under the terms of the insolvency arrangement initially approved, provided that it presents a proposal to amend such arrangement and this proposal is given leave to proceed.

The Judge will not order the commencement of the liquidation of assets stage during this one-year period, even if a creditor proves the existence of facts corroborating the declaration of the debtor's insolvency.

c. Consideration of claims against the insolvency estate arising from any type of financing or guarantee provided to the insolvent party and included in the approved or amended arrangement

The measures designed to avoid the commencement of the liquidation stage due to a breach of the insolvency arrangement have been strengthened by an incentive to the financing provided at that time, even if provided by specially related persons. If an insolvency arrangement approved or amended within two years of the declaration of

the State of Emergency is breached, such financing will be considered a claim against the estate, provided that the approved or amended arrangement includes the details of the transaction.

d. Expedited processing of ancillary proceedings

Documentary proof will be the only admissible proof (and must be attached to both the claim and statement of defence) in insolvency proceedings in which the inventory and list of creditors have not yet been filed, as well as in those insolvencies declared within two years of the declaration of the State of Emergency. Hearings will not be held unless the judge deems it necessary.

Defendants who do not reply to a claim will be held to have accepted that claim, except in the case of public creditors.

e. Preferential processing

RDL 16/2020 establishes that a set of actions understood to facilitate the continuity of economic activity will be given priority in processing during the year following the declaration of the State of Emergency[1].

f. Preference for the extrajudicial sale of assets, except for sales of production units

The auction of assets and rights of the insolvency estate must be extrajudicial in insolvency proceedings declared within a year of the declaration of the State of Emergency and in those underway during that period, even where the liquidation plan establishes otherwise.

This rule is intended to reduce the courts' workload, but has two exceptions: (i) the sale of the company or of production units may be carried out by means of a judicial or extrajudicial auction; and (ii) the terms of judicial authorisations for the direct realisation of preferential assets and rights, or debt-asset swaps (*pro soluto* or *pro solvendo*), must be observed.

g. Expedited approval of liquidation plans

Courts will immediately approve liquidation plans already submitted when the State of Emergency is lifted, with any modifications they deem appropriate. The processing of submitted liquidation plans will also be expedited, to ensure they are immediately approved.

[1] Article 14 RDL 16/2020 establishes the actions that must be given priority in processing: a) labour-related ancillary proceedings; b) actions involving the transfer of production units or bulk sale of the components of an asset; c) proposals for arrangements or proposals to amend those arrangements that are within the compliance period, as well as oppositions to the judicial approval of an arrangement; d) ancillary proceedings to reinstate the insolvency estate; e) leave to proceed for requests for the homologation of a refinancing agreement or the amendment of one already in force; f) adoption of interim injunctions and, in general, any other measures that could contribute to the preservation of the assets and rights, in the view of the judge overseeing the insolvency proceedings.

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