New insolvency and restructuring measures due to COVID-19 pandemic

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- **Suspended duty to apply for insolvency proceedings**
- **Measures concerning refinancing agreements**
- **Amendment of extra-judicial payment agreements**
- **Measures in phase of convention**

Due to the continuation of the COVID-19 pandemic, the government has approved a new act: Royal Decree-Law 34/2020 of 17 November 2020 on urgent measures to support business solvency and the energy sector in tax matters (RDL 34/2020). RDL 34/2020 affects the solvency support available to companies and introduces new, urgent measures in the finance and insolvency sectors. This article summarises these measures.

Suspended duty to apply for insolvency proceedings (Articles 583*ff* of TRLC)

Suspension of duty to file for insolvency proceedings

The duty of a debtor which is in a state of insolvency (whether current or imminent) to apply for voluntary bankruptcy under Article 5 of the Consolidated Text of the Bankruptcy Law (TRLC) has been suspended until 14 March 2021.

Necessary insolvency proceedings

Until 14 March 2021, applications for necessary insolvency proceedings filed after the declaration of the state of alert (ie, 14 March 2020) will not be accepted. If an application for a voluntary arrangement with creditors is submitted before 14 March 2021, it will be admitted with preference, even if it is submitted after the date of the necessary application for an arrangement with creditors.

Pre-insolvency proceedings by communication of Articles 583ff of TRLC (former Article 5bis of Insolvency Act)

While the state of alert is in force, the duty to apply for an insolvency proceeding is also suspended for those individuals or legal entities that have submitted the communication regulated in Article 583 of the TRLC (the so-called 'pre-insolvency proceeding'), even if the legal period established in Article 584 of the TRLC has expired.

However, if the debtor notified the creditors that negotiations had commenced to reach a refinancing agreement, extra-judicial payment agreement or adhesion to an advance proposal of agreement (Article 583 of the TRLC) before 31 December 2020 (inclusive), the general regime established by the law will apply. Nonetheless, in such cases, the debtor has no duty to request a declaration of bankruptcy within six months of the notification of the court.

Measures concerning refinancing agreements (Articles 583, 617 and 628 to 630 of the TRLC)

Debtors can modify existing refinancing agreements or reach new ones

The court competent to make a declaration of bankruptcy must be informed that a debtor has initiated or intends to initiate negotiations with creditors to modify an existing agreement or reach a new one, even if one year has not passed since the previous application for approval.

Proposals may be submitted within one year of the declaration of the state of alert (ie, until 14 March 2021).

Priority is given to a debtor's communication with the competent court that it has started negotiations over applications for a declaration of default of a refinancing agreement submitted by creditors, provided that the communication is made within one month of 31 January 2021. Requests for a declaration of non-fulfilment of the refinancing agreement submitted before 31 January 2021 will be notified to the debtor, but will not be admitted for processing until the end of the following month (ie, from 28 February 2021) without the communication having been made. In the event that the communication has been made to the competent court, a request for a declaration of non-fulfilment will not be admitted unless the debtor fails to reach an agreement to modify the existing agreement or agree a new one within three months.

Amendment of extra-judicial payment agreements (Title III, Second Book of TRLC)

Debtors can make proposals to modify out-of-court settlement agreements within performance period

To modify an out-of-court settlement agreement, the same rules as stipulated for the modification of bankruptcy agreements have been extended; therefore:

- the proposal may be submitted within one year of the declaration of the state of alert (ie, until 14 March 2021); and
- the procedure (which must be in writing) and the minimum majorities required for approval of the amendment are the same as those required for approval of the original agreement

Until 14 March 2021, in order to speed up the processing of extra-judicial payment agreements and initiate the consecutive insolvency proceedings, an agreement will be considered to have been attempted by the debtor without success when it can be demonstrated that two failures to accept the appointment of the insolvency mediator have occurred.

Measures in phase of convention (Chapter VII, Title VIII, First Book of TRLC)

Amendment of insolvency agreements

Debtors can formulate proposals to modify agreements being complied with

Such proposals may be submitted within one year of the declaration of the state of alert (ie, until 14 March 2021) and must be accompanied by the documentation specified in Article 3.1 of Law 3/2020.

The procedure (which must be in writing) and the minimum majorities required for approval of the amendment are the same as those required for approval of the original agreement.

The amendment must not affect:

- the claims accrued or incurred during the period of performance of the original agreement; or
- the privileged creditors to whom the effectiveness of the agreement has been extended or who have adhered to it once it has been approved, unless they vote in favour of or expressly adhere to the proposed amendment.

Requests to modify an agreement by the bankrupt party will be prioritised over requests for a declaration of non-fulfilment of the agreement presented by the creditors before 31 January 2021, provided that the request for modification is presented within three months of 31 January 2021 (ie, before 30 April 2021). Requests for a declaration of non-compliance with the agreement submitted before 31 January 2021 will be notified to the bankrupt party, but will not be admitted for processing within three months of this date (ie, until 30 April 2021).

Before the entry into force of RDL 34/2020, Law 3/2020 provided that applications for the non-fulfilment of agreements submitted up to 31 October 2020 (inclusive) would not be admitted for processing if the debtor submitted an application to modify the agreement within the following three months. In accordance with the amendments introduced by RDL 34/2020, applications for the termination of agreements submitted between 31 October 2020 and 31 January 2021 will also be inadmissible until three months after 31 January 2021.

However, RDL 34/2020 did not enter into force until 19 November 2020. Therefore, before its entry into force, judges had to admit applications for non-compliance filed after 1 November 2020. For this reason, in order to respond to applications for a declaration non-fulfilment of an agreement that were admitted between 1 November 2020 and 19 November 2020, RDL 34/2020 adds Paragraph 4 to Article 3 of Law 3/2020, which provides that these proceedings will be suspended for three months. If, during these three months, the debtor presents a proposal to modify the agreement, the judge will close the procedure for the application for the non-fulfilment of the agreement admitted for processing and will prioritise the proposal to modify the agreement.

Deferral of duty to apply to open liquidation phase

The deadlines for opening the liquidation phase for non-compliance with an agreement have been extended. In particular:

- debtors have no duty to request the liquidation of assets despite knowing of the impossibility of complying with the committed payments or the obligations incurred after the approval of the original insolvency agreement, provided that they have submitted a proposal to amend the agreement and this has been accepted within one year of the declaration of the state of alert (ie, up to 14 March 2021); and
- judges will not issue an order opening the liquidation phase, even if the creditor proves the existence of some of the facts that may support the declaration of bankruptcy, within one year of the declaration of the state of alert (ie, until 14/03/2021).

The rules for the recognition of certain credits, in the context of a breach of an approved or modified agreement which occurs within two years of the declaration of the state of alert (ie, until 14 March 2022), have been modified. Specifically, credits derived from cash income from loans, credits or other similar businesses that have been granted to the bankrupt party or derived from guarantees constituted in favour of the latter by any person will be classified as credits against the estate. This classification will also apply if cash income or the guarantees were granted by a person especially related to the bankrupt party according to Article 9(3) of the RDL 16/2020.

Preferential treatment of certain proceedings and methods

In view of the increase in problems and litigation in certain areas, preferential treatment has been established for:

- the insolvency proceedings of debtors who are natural persons and do not have the status of entrepreneur;
- insolvency incidents in labour matters;
- actions aimed at the sale of production units or the sale of assets in a balloon scenario;
- proposals for agreements or modifications of agreements during the period of compliance, as well as incidents of opposition to the judicial approval of agreements;
- bankruptcy incidents regarding the reintegration of the active mass;
- admissions to process applications for the approval of a refinancing agreement or the modification of an existing one;
- the adoption of precautionary measures and, in general, any other measures which, in the opinion of the bankruptcy judge, may contribute to the maintenance and conservation of the assets and rights;
- insolvency proceedings started by an insolvency mediator after a failed attempt to reach an extra-judicial payment agreement by a natural person in insolvency, who has no assets and for whom it is impossible to present a plan for partial repayment of debt. In such cases, preferential treatment will apply only if there is already a provisional list of creditors and the insolvency is qualified as not guilty. Further, the bankrupt party must request the full discharge of debt, together with a responsible statement declaring that they have no assets; and
- in cases where the debtor requests the 'full discharge of debt'.

This is a temporary measure which will apply for one year from the declaration of the state of alert (ie, until 14 March 2021), with the exception of the preferential processing of the bankruptcy of non-entrepreneurial natural persons, which is limited until 31 December 2020.

Suspension of cause of dissolution for losses in 2020

Losses in financial year 2020 will not be taken into consideration, for the sole purpose of determining the concurrence of the cause for dissolution provided for in Article 363.1(e) of the Law of Capital Companies.

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