Royal Decree-law 16/2020: procedural, organisational and technical measures under the administration of justice

CMS Spain

5 May 2020

Contents

Royal Decree-law 16/2020: procedural, organisational and technical measures under the administration of justice

I. Bankruptcy and corporate measures

Royal Decree-law 16/2020 of 28 April on procedural and organisational measures to address COVID-19 under the administration of justice (hereinafter, the "**Royal Decree-law**") was published in Spain's Official State Gazette (BOE) on 29 April 2020. Chapter II of the Royal Decree-law sets out bankruptcy and enterprise-related measures mainly aimed at strengthening corporate financing, meeting liquidity needs and ensuring the continuity of activity. In essence, this means preventing a heavy decline in jobs and production, as well as an attempt to limit the impact this may have on our economy.

1. Pre-arrangement with creditors

1.1. Judicially-approved refinancing agreements (Article 10)

In a bid to promote preventative restructuring solutions on the back of a recognised breach, debtors holding a judicially-approved refinancing agreement are now able to amend the agreement in force or enter into a new one. Two different scenarios are envisaged:

i. Voluntary, where the debtor informs the court that negotiations have started with creditors to amend the agreement in force or enter into a new one. This option will be available for one year from the state of emergency declaration.

ii. Where a request is filed for the recognition of a breach of the judicially-approved refinancing agreement within six months following the state of emergency declaration. In this case, the court will notify the debtor of the corresponding requests filed, restricting their admissibility to the following circumstances:

- One month following the end of the aforementioned six-month period if the debtor does not notify the court of any negotiations.
- If within the seventh month the debtor notifies the court that negotiations have been entered into to amend the judicially-approved agreement or to conclude a new one, but fails to reach such agreement within three months following the notification.

Please find below a diagram summarising the referred timelines:

1.2. Out-of-court workouts (Article 17)

Where the bankruptcy mediator appointed to oversee an out-of-court workout fails to accept the position twice during the 12 months following the state of emergency declaration, the debtor's attempt to reach such form of agreement will be considered unsuccessful. Notifying the court of this circumstance with a view to filing for bankruptcy will be deemed a consecutive bankruptcy.

1.3. Losses for the 2020 fiscal year (Article 18)

Losses suffered in 2020 will not be taken into account as part of the grounds for winding-up the company in the event of losses which reduce its net equity to less than half its share capital. However, this should be taken with caution as it does not affect the duty to file for a bankruptcy declaration, which remains in force under the Royal Decree-law.

In any event, if losses triggering such grounds for winding-up the company are recorded at 2021 year-end, a general shareholders' meeting would have to be called to pass a winding-up, share capital increase or share capital reduction resolution (once again, notwithstanding the duty to file for bankruptcy, where applicable).

2. Filing for bankruptcy (Article 11, transitional provision 2.1 and single repealing provision)

The basis for the regulation introduced in this section is the repealing of Article 43 of Royal Decree-law 8/2020 of 17 March on urgent and extraordinary measures to address the social and economic impact of COVID-19, which amended the rules on filing for bankruptcy. The measures affect both voluntary and involuntary bankruptcy filings, amended as follows in terms of their timelines:

Up to 31 December 2020	General legal arrangement
Insolvent debtors will not be obliged to file for **voluntary bankruptcy**, regardless of whether they have issued the notification under Article 5 bis of the Spanish Insolvency Act (negotiations for a refinancing agreement, out-of-court workout or early creditors' arrangement proposal).	If the debtor issues the notification under Article 5 bis of the Insolvency Act prior to 30 September 2020.
Involuntary bankruptcy filings submitted during the state of emergency will not be admitted to proceedings. If the debtor files for **voluntary bankruptcy**, even subsequently, it will be admitted with priority.	

At this stage, it is important to note that in any event, the fact that the duty to file for bankruptcy remains suspended does not prevent the debtor from exercising their right and opting to file for voluntary bankruptcy.

3. Classification of credits and procedural aspects (Articles 12, 9.3 and 13)

3.1. Classification of credits (Article 12 and 9.3)

For the purpose of helping to overcome the situation of insolvency which companies find themselves in on the back of COVID-19 and causing them to seek funding to attend to temporary cash-related needs, as well as to prevent the commercial courts becoming overwhelmed, Article 12 of the Royal Decree-law states that in bankruptcies recognised **within the two years following the state of emergency declaration**, credits derived from cash income from loans, credits or other similar transactions granted to the debtor after the state of emergency declaration by those who, according to the Insolvency Act, are considered **specially-related parties**, will be classified as **ordinary credits**. The same classification will be given to credits which specially-related parties to the debtor have taken on by paying ordinary or preferential credits on behalf of the debtor following the state of emergency declaration.

Equally, in the event of a breach of the amended or approved agreement **within the two years following the state of emergency declaration**, credits derived from cash income from loans, credits or other similar transactions granted to the debtor or stemming from personal guarantees or security interests established in favour of the debtor by any persons, including specially-related

parties, will be classified as credits against the estate, provided that the identity of the debtor and the maximum amount of the loan or guarantee committed are recognised.

3.2. Contesting the inventory and list of creditors (Article 13)

In bankruptcies where the administrators are yet to submit the assets and rights inventory or the list of creditors, as well as in those declared within the two years following the state of emergency declaration, the Royal Decree-law **excludes the requirement for a court hearing** to resolve disputes arising from a challenge to the inventory, with documents and expert reports the only admissible evidence (which in turn must be attached to the challenge petition and any corresponding answers to the claims).

What's more, it clarifies that a failure by any of the defendants to answer the claim will be considered acquiescence, except in the case of public institutional creditors.

- Breach of approved or amended agreements during this period – Loans and payments by the debtor's specially-related parties considered credits against the estate.
- Loans and payments by the debtor's specially-related parties considered ordinary credits.
- No requirement for a court hearing to resolve disputes arising from a challenge to the inventory and list of creditors unless otherwise agreed by the judge.

3.3. Preferential processing (Article 14)

A further procedural aspect addressed by the Royal Decree-law as a means of streamlining bankruptcy proceedings is that of preferential processing of the actions listed in Article 14 up to one year following the state of emergency declaration. For example, the impact on employment and actions geared towards offloading production units or selling elements of an asset are of note.

4. Arrangements and out-of-court workouts (Articles 8 and 9 and transitional provisions 2.2 and 3)

Regarding arrangements with creditors and out-of-court workouts, measures have been put in place to prevent a breach of these agreements by the debtors. Arrangements with creditors have been made more flexible to allow the debtor's activity to continue in the face of liquidation, which under ordinary circumstances would automatically arise from the recognition of a breach. For such purpose, debtors are now afforded the possibility of putting together proposals to amend arrangements or out-of-court workouts still within their term:

i. The debtor may submit these proposals within the 12 months following the state of emergency declaration, with the general processing regulations and, in any event, written processing, applicable in this case. Equally, the majorities required for the original arrangement will be observed irrespective of the content the parties wish to amend. Extension to preferential creditors affected by the previous arrangement will only occur if they expressly agree to the amendment proposal.

ii. Where the creditors petition a recognition of breach within the six months following the state of emergency declaration, the debtor will be notified and will then have three additional months to submit an amendment proposal (to be processed as a priority). The court will not accept a petition for the recognition of a breach until the referred nine months have passed from the state of emergency declaration. The same applies to breach-related petitions filed up to the entry into force of the Royal Decree-law.

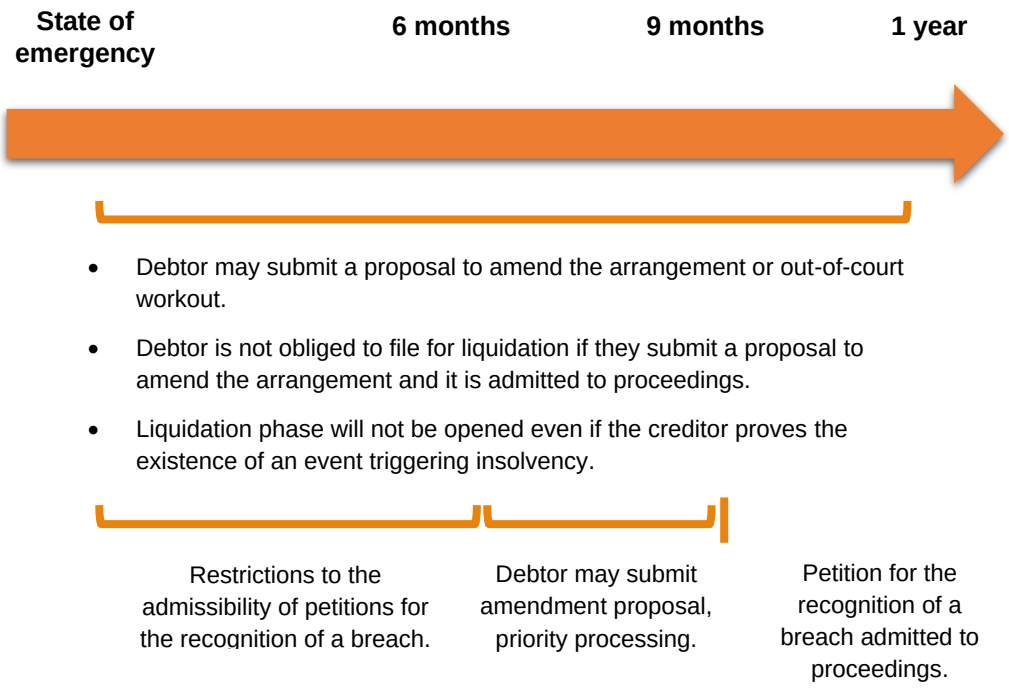
In specific view of the opening of the liquidation phase:

i. If, during the state of emergency period and up to the entry into force of the Royal Decree-law, debtors have filed for liquidation due to being unable to make the payments undertaken in the arrangement or to fulfil their obligations assumed following its approval, the court will not attend to such filing where the debtor submits an amendment proposal.

ii. In addition, during the 12 months from the state of emergency declaration, the debtor will not be obliged to file for liquidation due to being unable to make the payments undertaken in the arrangement or to fulfil their obligations assumed following its approval, provided that they submit a proposal to amend the arrangement, which is admitted to proceedings prior to the end of said 12-month period.

iii. Also during the 12 months from the state of emergency declaration, the judge will not agree to opening the liquidation phase even if the corresponding creditor is able to prove the existence of the events triggering insolvency.

Please find below a summary of the most important timelines set out under these measures:



5. Offloading the estate (Articles 16 and 15)

It is important to point out that the Royal Decree-law streamlines the approval of liquidation plans disclosed prior to the lifting of the state of emergency. Consequently, if by that time 15 days have already passed since disclosure, the judge will issue an order approving the liquidation plan (with the possibility of introducing the amendments deemed necessary) or liquidation in accordance with supplementary regulations. The disclosure of the liquidation plans submitted but not provided for such purpose will also be encouraged.

Lastly, in anticipation of a surge in the number of auctions and in line with the principle of streamlining bankruptcy proceedings, **auctions involving assets and rights of the estate** as part of declared bankruptcies **within the 12 months following the state of emergency declaration** and those being processed at the end of such period **must be performed out-of-court**, even if the liquidation plan states otherwise.

However, it should be pointed out that the possibility of selling production units remains at any stage of bankruptcy via court or out-of-court auction or via any means provided for in the Insolvency Act (direct sale, among others).

II. Procedural, organisational and technical measures under the administration of justice

Please find below an analysis of the most pertinent procedural, civil and administration of justice measures contained in Chapters I and II of the Royal Decree-law[1].

1. Procedural measures

The following procedural-related measures are regulated under the Royal Decree-law:

i. For the purpose of legal proceedings, 11 and 31 August are considered working days; excluding Saturdays, Sundays and bank holidays (Article 1). Working days highlighted in yellow:

The aim of this measure is to partially re-schedule the procedural actions which have not been carried out during the state of emergency and to soften the negative impact that the expected rise in litigation on the back of the health crisis may have.

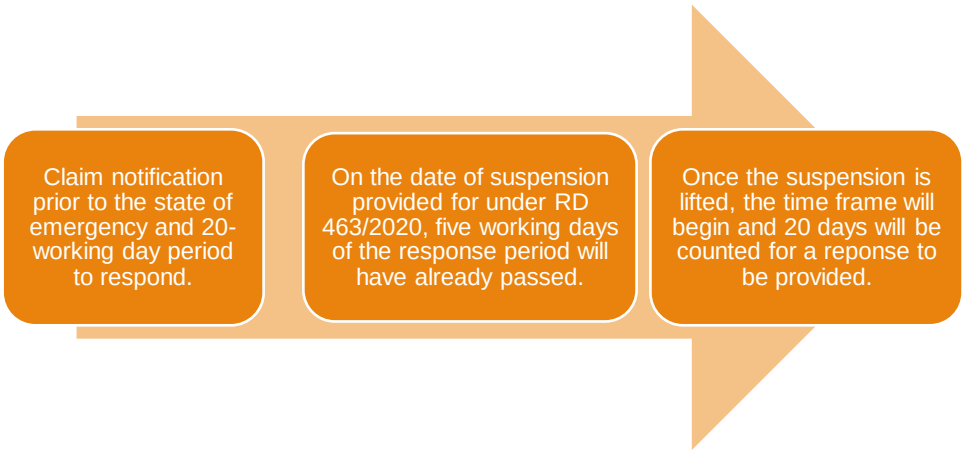
The measure entails an amendment to Article 183 of the Constitutional Act on the Judiciary (*Ley Orgánica del Poder Judicial*, hereinafter the "**LOPJ**") which states that "*every day during the month of August will be a non-working day for all judicial actions, except for those declared urgent under dispute resolution laws*".

ii. Regarding procedural timelines, the Royal Decree-law (Article 2) supplements the regulation contained in "*Royal Decree 463/2020 of 14 March on the suspension and interruption of procedural timelines and terms*" (hereinafter, "**Royal Decree 463/2020**") with the following two rules:

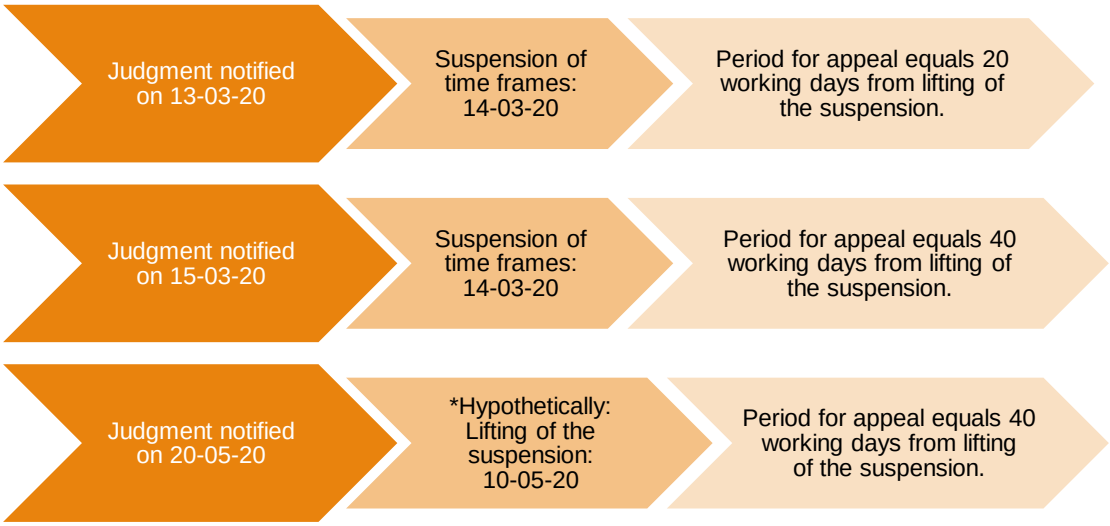
- Calculation of the time frames suspended by the state of emergency declaration will **restart** without taking into account the period elapsed prior to suspension. This

[1] The procedural measures adopted under the Royal Decree-law relating to family law are not included in this report.

corrects the wording of the second additional provision of Royal Decree 436/2020, which indicated that these periods would "*resume*". Example:



- Moreover, the time frames to announce, prepare, draw up and/or file appeals against judgments and other decisions which put an end to proceedings under procedural regulations will be extended by a term equal to the one given for the specific procedure in question. Such extension will apply when the corresponding decision has been notified **during** the state of emergency and to those issued to the parties **within the 20 working days following the lifting of the suspension** of procedural timelines. Example:



iii. The Royal Decree-law (Article 7) also stipulates that certain legal proceedings will be given priority, most notably the following in the civil courts:

- ➔ **Proceedings stemming from a failure by the creditor entity to recognise the moratorium on mortgages for habitual residences and properties used for economic activity.**
- ➔ **Proceedings stemming from claims which tenants may file on the back of a failure to apply the legally-prescribed moratorium or mandatory contract extension, as well as bankruptcy proceedings against natural-person debtors.**

These priority measures will be in force from the time at which the suspension of procedural time frames is lifted until 31 December 2020, albeit the Royal Decree-law does not specify the implications of being considered a "priority" or how the processing of these matters will play out against the rest of the cases underway.

Such priority should be understood without prejudice to the continuation of all other legal actions, as the opposite could lead to the proceedings considered "non-priority" being brought to a halt.

2. Organisational and technical measures

The Royal Decree-law also sets out the following organisational and technical measures:

2.1. Measures to conduct proceedings

i. **Proceedings conducted online**:

The Royal Decree-law states that all hearings due to be held during the state of emergency period or within the three months from it being lifted are to be preferably conducted online (Article 19). This provision also applies to proceedings carried out within the public prosecution service during the same period.

As indicated in the wording of the Royal Decree-law, the effectiveness of this measure will largely depend on the courts having the required technical means available. Moreover, being able to guarantee that witnesses and experts can be correctly identified is paramount. Against this backdrop, the first final provision of the Royal Decree-law amends Act 18/2011 of 5 July on the use of ICT in the administration of justice to recognise citizens' right to utilise identification and signature mechanisms based on electronically-signed certificates as provided for in Act 39/2015 of 1 October on the Common Procedures of Public Authorities.

This measure could entail an amendment to Article 229 of the LOPJ based on which the administration of justice lawyer would be required to ratify the identification of the persons joining via video-conference from the court.

Another challenge posed by this measure for the purpose of safeguarding the parties' right to defence is to ensure that the witnesses and experts testify separately and therefore do not collude or hear each other's testimonies.

ii. **Measures to conduct proceedings at the courts when doing so online is not possible**:

As for hearings or proceedings which cannot be conducted online, the Royal Decree-law sets out a series of measures to hold such events in court.

Specifically, during the state of emergency and for up to three months after it is lifted, the judge or court may order public access to oral proceedings (Article 20) and exempt those attending oral proceedings from wearing robes (Article 22). In addition, proceedings may in principle also be held in the afternoon (Article 27 and Preamble II).

Restricting the attendees does not appear to pose major problems as the principle of public access to legal proceedings is already subject to certain limits (Article 232.3 of the LOPJ) and, in any event, is safeguarded by the recording of hearings.

In turn, the exemption of wearing robes as a strictly protocol-related matter and the holding of proceedings in the afternoon as a question of organisation do not require further analysis.

iii. **Possibility of conducting proceedings during the state of emergency**:

As explained, the Royal Decree-law mentions several possibilities in relation to conducting legal proceedings either in court or online during the state of emergency (Articles 19, 20 and 22).

However, all of these stipulations under the Royal Decree-law should be taken in accordance with the terms of the resolution of the General Council of the Judiciary Standing Committee dated 25 April, by virtue of which all proceedings are suspended until Royal Decree 487/2020 of 10 April extending the state of emergency to manage the health-related crisis triggered by COVID-19 (hereinafter, "**Royal Decree 487/2020**") no longer remains in force.

In principle, during the extension granted under Royal Decree 487/2020, only proceedings – in accordance with sections (i) and (ii) – relating to essential services will be conducted.

2.2. Measures relating to the special rules on attending to the public

The Royal Decree-law sets out special rules on attending to the public, stating that all queries are to be submitted by telephone or email (Article 23.1). Where this is not possible, citizens may book an appointment to attend court (Article 23.2).

Emphasis is made to the need to observe the terms of Constitutional Act 3/2018 of 5 December on the Protection of Personal Data and the guarantee of digital rights, which will be of the utmost importance in all services where identifying users can be challenging.

2.3. Measures relating to the transformation of judicial bodies to cover COVID-19-related litigation and amendments to the statutory and employment conditions of those rendering services for the administration of justice

Firstly, the Royal Decree-law provides the possibility for the Ministry of Justice to agree to judicial bodies yet to be operational to be transformed into services created exclusively to preside over proceedings linked to COVID-19 (Article 24.1). Moreover, under Article 25, regionally-appointed judges will be assigned to the bodies presiding over the proceedings linked to COVID-19.

Secondly, lawyers and other civil servants working for the administration of justice may also be assigned to perform the duties attributed to support units other than the areas to which they were appointed, provided that said unit is located in the same district and belongs to the same jurisdiction as the one where the lawyer or civil servant has been performing their professional activity (Article 26). In addition, acting administration of justice lawyers may provide replacement and relief (Article 28).

Lastly, morning and afternoon shifts have been created for administration of justice lawyers and staff covering all services and jurisdictions (Article 27).

This analysis has been prepared by the Dispute Resolution & Arbitration team at CMS Albiñana & Suárez de Lezo:

- **Juan Ignacio Fernández Aguado** | Parter, Dispute Resolution & Arbitration / Insolvency & Restructuring.
- **Marta Lalaguna** | Senior Associate, Dispute Resolution & Arbitration.
- **Elisa Martín** | Associate, Dispute Resolution & Arbitration / Insolvency & Restructuring.
- **Nicolás González** | Associate, Dispute Resolution & Arbitration.
- **Gonzalo de Porres** | Associate, Dispute Resolution & Arbitration.
- **Marta Cerrada** | Associate, Dispute Resolution & Arbitration.
- **Livia Domingo** | Associate, Dispute Resolution & Arbitration / Insolvency & Restructuring.

CMS Albiñana & Suárez de Lezo, Paseo de Recoletos, 7-9 – 28004 Madrid – Spain

T +34 91 451 93 00 – F +34 91 442 60 45 – madrid@cms-asl.com