

Law on urgent insolvency-related measures (originating from Royal Decree-Law 11/2014, of September 5, 2014)

Today, May 26, 2015, the Official State Gazette ("BOE") has published Law 9/2015, of May 25, 2015, on urgent insolvency-related measures (the "Law"), which enters into force the following day.

This new law transfers to the Insolvency Law (*Ley Concursal* or "LC") the wording of Royal Decree Law 11/2014, of September 5, 2014 ("RDL 11/2014"), which made fundamental amendments to the LC in relation to the classification of claims, the terms of the creditors' arrangement and the majorities needed for its approval, and the transfer of production units in an insolvency proceeding. For further details on RDL 11/2014, see our [special single-topic Commentary](#).

The passage through parliament of RDL 11/2014 resulted in new amendments being added to the LC; mostly technical enhancements resolving the doubts arisen in the application of earlier reforms. Some other significant new changes were made which are explained below. In one such change, the new Law authorizes the government to prepare and approve a Revised LC to consolidate and harmonize the amendments added in the successive reforms of the LC (2009, 2011 and 2014, principally).

The main amendments introduced by this new reform are as follows:

1. Amendments related to the creditors' arrangement in insolvency proceedings

1.1 Proposals containing diverse terms "additional to" release and deferral (art. 100 LC)

It is clarified that, aside from the proposed release (haircut) and/or deferral terms that are required in a proposal for an arrangement, proposals with diverse terms (i.e., on the conversion of claims into equity, conversion of claims into participation loans, etc.) may be not just alternative to the proposed release and/or deferral terms, but also additional or cumulative to them.

This circumstance will affect the majorities needed for approval of the arrangement which are provided in article 124 LC and vary depending on its terms.

1.2 Option to amend advance proposals for an arrangement that have not been approved (art. 110 LC)

If after trying to secure the approval of an advance proposal for an arrangement ("PAC"), the debtor fails to secure that approval but requests the commencement of the arrangement phase to try and secure the approval of an ordinary proposal for an arrangement, the debtor is allowed to amend the PAC submitted earlier or even prepare a new one.

1.3 Preferred claims and quorum for convening creditors' meetings (art. 116.4 LC)

RDL 11/2014 allowed the effects of the arrangement to be made binding on creditors holding preferred claims, from which it clearly looked as though the attendance of these creditors at the creditors' meeting would affect the quorum for convening that meeting.

The new Law provides on this subject that where half of the unsecured claims are not present, the creditors' meeting will also be held validly convened where attended by creditors holding at least half of the claims in the insolvency proceeding for which the arrangement might be binding, without including subordinated claims.

1.4 Computation of majorities to approve a creditors' arrangement and preferred creditors (art. 124 LC)

It is clarified that the claims of any preferred creditors who vote for a proposal for an arrangement will be counted as unsecured claims, only for the purpose of computing the majorities. This provision had disappeared in RDL 11/2014 which did not contribute to the approval of arrangements at companies with mostly preferred claims.

1.5 New changes in the rules on amendment of the creditors' arrangement (transitional provision three of the law)

RDL 11/2014 added the option for the debtor and given creditors to request the amendment of breached arrangements within the two years following the entry into force of the decree, subject to a number of conditions.

The new Law extends that option for arrangements breached in the two years after it has come into force and introduces the following amendments to the rules:

Entitlement for creditors to request amendment of the arrangement: it is clarified that the 30% of creditors giving entitlement to submit a request for amendment of an arrangement must be calculated by reference to the final version of the insolvency manager's report.

Obligation to file a viability plan: the request for amendment of the arrangement must be accompanied by a proposal for an amendment together with a viability plan.

No declaration of breach of the arrangement can be requested during the procedure for amendment of the arrangement: while the procedure for amendment of the arrangement under this transitional provision is in progress, no creditor can request a declaration of breach of the arrangement or the commencement of the liquidation phase, and any that have already been requested will be stayed.

Option to object to the valuation of claims set out in the final version of the insolvency manager's report: debtor and creditors may request an amendment to the final version of the list of creditors, stating the current amount and modifications occurred to the existing claims and requesting a tolling of the period for stating their acceptance or objection to the proposed amendment. These objections will be conducted as an ancillary proceeding and the decision on those proceedings will not be appealable. The judgment rendered in the proceeding will order the lifting of the tolling of the period given to the objector to state his acceptance or rejection of the proposed amendment to the arrangement.

Refusal of the proposed amendment to the arrangement: if the amendment to the arrangement is refused, breach of the arrangement will be declared with the effects in art. 140 LC.

2. Amendments related to the liquidation

2.1 Precautionary cash deposit (art. 148.6 LC)

RDL 11/2014 introduced the option for the judge to decide, on his own initiative or on motion of a party, to withhold 10% of the assets available to creditors for the satisfaction of any claims that might result from appeals against liquidation decisions that might be lodged by certain creditors.

The Law modifies this precautionary and specific measure to the effect that what the judge may order to the benefit of these creditors is the deposit of up to 15% of the proceeds of every disposal of assets and rights in the assets available to creditors or of the cash payments made against those assets.

2.2 Statutory rules on liquidation and rules for sales of production units

The name of the traditional secondary rules on the liquidation under art. 149 LC has been changed to "*statutory liquidation rules*", and it is clarified which are secondary and which must be applied in every liquidation, whether there is a liquidation plan or not.

It is specified in particular that the statutory rules on the transfer of assets associated with preferred claims included in a production unit will apply to all liquidations.

Similarly, the rules contained in art. 149 LC will apply to all sales of production units that take place in the common phase of the insolvency proceeding under the mechanism in art. 43 LC and in the liquidation phase of abbreviated proceedings.

2.3 Priority of the liquidation plan: the rules on the enforced collection proceeding are secondary (art. 149.2 LC)

It is specified that all the insolvent debtor's assets will be transferred, according to their nature, as determined in the provisions in the liquidation plan. Only if that plan does not contain a specific provision will the provisions in the procedural legislation (Civil Procedure Law) on enforced collection proceedings be applicable on a secondary basis.

2.4 Measures concerning the transfer of production units

▪ Creation of the "insolvency liquidations portal" (art. 148.7 LC)

Following the approval of the liquidation plan and with the aim to facilitate the sale of companies in liquidation, the insolvency manager will have to send to the liquidations portal at the Insolvency Public Registry all detailed information on the insolvent company that is relevant to the transfer. To this end, additional provision two of the Law requires the creation in nine months of a remote access portal which will contain a list of the companies in the liquidation phase of an insolvency proceeding and the necessary information to facilitate the transfer of all its establishments or production units.

- **Sale of production units: broadening of the judge's discretion to choose the best bid where more than one are submitted (art. 149.1.3^a LC)**

The judge may chose as the best bid any that has a price 15% below the price offered in the highest bid, insofar as the lower bid guarantees to a greater extent the continuity of the company and of jobs, and the best satisfaction of claims.

- **Sale of production units: the acquirer not subrogated in respect of tax and social security claims regarding assets encumbered with special preferred rights (art. 149.2 b LC)**

The acquirers of assets encumbered with special preferred rights for the tax or social security authorities will not be subrogated in respect of the secured obligation (and so their debtor will continue to be the insolvent company) even though the security provided to them may subsist.

2.5 Period for submitting the final report on the liquidation (art. 152 LC)

The Law specifies that the insolvency receiver must submit to the judge in the insolvency proceeding a final report on the grounds for the liquidation within the month following the conclusion of the liquidation of the assets available to creditors. If the assessment section is in progress, the final report must be submitted within the month following the notification of the judgment holding that the insolvency proceeding is fortuitous or fault-based.

2.6 Collection by a specially preferred creditor of the proceeds obtained from realizing the asset and to the extent of the amount of the originating debt (art. 155.5 LC)

Regardless of the value of the security attributed by the insolvency manager and the amount of the specially preferred claim acknowledged to the specially preferred creditor, this creditor may –whenever there has been transfer or a compulsory realization of the secured asset– keep the amount obtained to the extent of the originating debt. It thus makes applicable to all types of transfers of secured assets the advantage already held by specially preferred creditors in the event of a sale of the secured asset after breach of the arrangement.

3. Amendments regarding assessment of the insolvency: causal element included in presumed fault scenarios (art. 165 LC)

For certain practices presumed to indicate fault it must be evidenced that they actually caused the harmful act that is condemnable for assessment purposes. In particular:

- Failure to attend the creditors meeting by the debtor, its legal representatives, directors or liquidators: fault will only be presumed where their participation at the meeting would have been a determining factor for the approval of the arrangement.
- Refusal without reasonable cause by the shareholders and directors to allow the conversion of debts into equity or the issuance of convertible securities or instruments: it is clarified that the refusal must have frustrated the achievement of a refinancing agreement under article 71 bis.1 or under additional provision four or of an out of court payments agreement.

4. Amendments regarding the procedure under article 5 bis LC

The Law makes a number of amendments to the mechanics of the notice of negotiations procedure under article 5 bis ("Preinsolvency Notice").

Notably, the debtor's obligation, when making the notice, to indicate any enforcement procedures that are being conducted against its assets and which of these procedures concern assets it considers are necessary for the continuity of its professional or trading activity, as a prior requirement to prevent the commencement of enforcements or stay any that might be in progress.

This information must be included in the decree holding the preinsolvency notice to have been made. In the event of a dispute over whether the asset is necessary, that decree may be appealed to the judge with jurisdiction to handle the insolvency proceeding and the prohibition or stay of the enforcement will be lifted if it is ruled that the assets or rights against which the debt is sought to be enforced are not necessary for the continuity of the professional or trading activity.

5. Other amendments

5.1 **Broadened tasks of the insolvency manager concerning labor matters (art. 33 LC)**

The insolvency manager will participate in procedures for collective transfers, for collective layoffs and for temporary interruptions of contracts and short-time working (besides participating in those for substantial modifications to working conditions on a collective basis as was already provided).

5.2 **Conversion of claims into equity and taking up office as director: limits on the definition of "specially related person" (art. 93 LC)**

On the adoption of RDL 1/2015 ("**RDL 1/2015**") on the second chance mechanism an exception was included to the definition of "specially related person" which this law harmonizes, which determines there will not be treated as a "specially related person" and accordingly they will avoid having their claims subordinated, any creditors which, pursuant to a refinancing agreement under art. 71 bis LC, under additional provision four LC ("*court approval*"), to an out of court payments agreement, or to an arrangement, have converted directly or indirectly all or some of their claims, even if they have taken up office as director at the debtor company by reason of that conversion into equity.

This exception in the definition of specially related person serves to complete the clarification that had already been introduced also in RDL 1/2015 in the limit preventing from being defined as "de facto director" not only the creditors who have executed a refinancing agreement under article 71 bis LC or under additional provision four, but also the creditors who have executed an arrangement or an out of court payments agreement, in respect of the obligations that the debtor may acquire under the viability plan, unless, of course, there is evidence of any circumstances underpinning that status.

5.3 **New creditor under labor law (art. 94.2 LC)**

In the classification of employee claims, economically dependent self-employed workers have been added as creditors under labor law.

5.4 New specifications for the final versions of the inventory and of the list of creditors (art. 96 LC)

New points to be included expressly in the final versions have been added: (i) the differences between the original inventory and list of creditors and the final versions following any challenge processes that have taken place have to be submitted; (ii) the maturity date of each of the claims in the updated list of post-insolvency order claims must be expressed.

5.5 Publicity and remote communications with creditors

The Insolvency Public Register (www.publicidadconcursal.es) will publish new milestones in the proceeding as the notification of the draft inventory and list of creditors, a list of all the requested rectifications or additions to those draft documents or a list of challenges submitted to the provisional report, expressing the petition requested in each of them.

Another new requirement is that the insolvency manager must send an informative notice remotely to all the known email addresses of creditors, stating: (i) the list of requested rectifications or additions to the draft inventory and list of creditors, which will also be notified to the debtor; (ii) the provisional report; (iii) the evaluation report on the proposal for an arrangement; (iv) the final versions; (vi) the report on submission of accounts; (vii) the quarterly reports on the liquidation, etc.

6. Statutory regime applicable to insolvency proceedings in progress

- All amendments to the law that concern the **creditors' arrangement** (those approved by RDL 11/2014 and the changes in its passage through parliament) will be applicable to insolvency proceedings in which the *final versions* have not been submitted by the insolvency manager. This clarification has dispelled the doubt created by RDL 11/2014, which provided that these amendments would only be applicable to insolvency proceedings in which the insolvency manager's *report* had not been issued, which some courts have taken to mean the *provisional report* rather than the *final versions*.

The provision on the quorum needed to convene the creditors' meeting (see point 1.3) will apply to all insolvency proceedings in which they have not voted on a proposal for an arrangement.

- All amendments to the law that concern the **liquidation** will be applicable to insolvency proceeding in which the liquidation phase has not commenced, except for the amendments under 149 LC, which will apply to insolvency proceedings in which the insolvency manager's final versions have not been submitted. This very considerably broadens the reach of the new rules on transfers of production units.

The amendments related to the proceeds to be received by creditors with specially preferred claims from the realization of the secured asset (see point 2.6. above) will be directly applicable to all insolvency proceedings in progress.

- The amendments concerning **assessment** of the insolvency proceeding (see point 3) will apply to any insolvency proceedings in progress in which the assessment section (section six) has not been formed.

- The new provisions on the preinsolvency notice or article 5 bis (see point 4) concerning enforcements against the debtor's assets will apply to the negotiations provided for in that article that have not reached completion, or in which the three-month period since they were notified to the court has not ended.
- The new contents of the **final versions** (see point 5.4) will be applicable to any insolvency proceedings in which the period for challenging the inventory and the list of creditors has not commenced.
- **All other amendments** in the law will be applicable to any insolvency proceedings in progress in which the insolvency manager has not submitted the *final versions*.

More information:

Antonio Fernández

Partner in charge of Restructuring and
Insolvency Work
antonio.fernandez.rodriquez@garrigues.com
T +34 91 514 52 00

Borja García-Alamán

Partner
borja.garcia-alaman@garrigues.com
T +34 91 514 52 00

Adrián Thery

Partner
adrian.thery@garrigues.com
T +34 91 514 52 00

Juan Verdugo

Partner
juan.verdugo.garcia@garrigues.com
T +34 91 514 52 00

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