URÍA MENÉNDEZ

A moratorium for mortgage-backed financing agreements in the tourism industry

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As part of the legislative package approved to alleviate the economic hardships caused by the COVID-19 crisis, the Spanish Government has passed Royal Decree-Law 25/2020 ("**RDL 25/2020**"), which grants debtors from the tourism sector a moratorium of up to 12 months on their payment obligations under financing agreements governed by Spanish law.

Requirements

RDL 25/2020 lists the following requirements in order to qualify for the moratorium:

- **Subjective requirements**

In order to be eligible for the moratorium, the debtor must

- be a self-employed worker (*trabajador autónomo*) or a legal person with its registered office in Spain;
- not have been declared insolvent prior to the date on which the Spanish Government declared the state of emergency pursuant to Royal Decree 463/2020 of 14 March (i.e., 14 March 2020); and
- have suffered financial difficulties as a result of the emergency caused by the COVID-19 crisis. Such financial difficulties are defined as a 40% drop in turnover for the March through May 2020 period, when compared to the same period in 2019 (and documentary evidence must be submitted together with the application).

RDL 25/2020 does not expressly state which lenders are bound to grant the moratorium, but it can be inferred that the lender must be a credit institution subject to the supervision by the Bank of Spain, for the following reasons:

- The borrower must apply for the moratorium after the entry into force of RDL 25/2020 (i.e., 7 July 2020) and before the end of the term set out in item 10 of the European Banking Authority Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis (i.e., 30 September 2020, unless extended in the future due to the evolution of the COVID-19 pandemic). The reference to these Guidelines only makes sense for those lenders under the EBA's influence.

- Article 9.1 of RDL 25/2020 imposes on lenders supervised by the Bank of Spain the obligation to deliver daily reports on the number of applications managed, and article 9.2 categorises the moratorium as a regulatory and disciplinary rule for the purposes of Law 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions. If the moratorium were to apply to all lenders alike, those subject to supervision would bear a heavier burden than those not.

- **Objective requirements**

The moratorium is only applicable to financing agreements that satisfy the following requirements:

- **Subject to Spanish law**. RDL 25/2020 provides no explanation for why it limits the moratorium on the basis of governing law, which could be deemed as being discriminatory against those debtors that have opted for a different governing law.
- Secured by a mortgage over a **real estate asset located in Spain** and used in a **tourism activity**. Satisfaction of this requirement is evidenced by the code assigned to the asset according to the National Classification of Economic Activities (*Clasificación Nacional de Actividades Económicas* or CNAE), which must be one of the following: 5510 (Hotels and similar accommodation), 5520 (Holiday and other short-stay accommodation) or 7911 (Travel agency activities).
- **Executed before 14 March 2020**, which is the date on which the Spanish Government declared the state of emergency pursuant to Royal Decree 463/2020 of 14 March.
- **Not having defaulted on payment obligations due prior to 1 January 2020** which remain unpaid as at 7 July 2020 (when RDL 25/2020 enters into force).
- **Not benefitting from any other moratoria** granted by the different regulations approved since the outbreak of the COVID-19 pandemic, nor from any which the debtor and its creditor may have mutually agreed. However, the borrower may (i) freely forfeit its right to the moratorium agreed (but not to those granted by law) and apply for the one set out in RDL

25/2020; and/or (ii) benefit from the moratorium set out in RDL 25/2020 to the extent the existing moratorium does not provide 12-month relief.

Application and effects

As stated above, qualifying debtors may request the moratorium from 7 July 2020 until 30 September 2020 by filing a request with their creditors together with the documents evidencing that the requirements set out above have been satisfied, in addition to their corporate purpose and registered office.

The moratorium applies to all due but unpaid instalments since 1 January 2020. The debtor may choose to either (a) distribute those unpaid instalments evenly among those remaining; or (b) allocate those unpaid instalments to the rear end of the repayment schedule, which will have the effect of extending the termination date by an equivalent number of months (up to a maximum of 12 months). The remaining terms and conditions of the financing agreement will remain unaltered unless the parties expressly agree otherwise.

Even though RDL 25/2020 does not give the creditor discretion to decide whether the requirements have been met, the moratorium is not granted automatically but requires that the financing agreement be formally amended and registered with the Land Registry. RDL 25/2020 clarifies that neither third-party guarantors nor lenders benefitting from junior security over the collateral may challenge the extension agreed under the moratorium.

RDL 25/2020 provides for a reduction in the notary and registry fees arising from formalising the moratorium, as well as a full stamp duty exemption (which is a significantly higher cost than the foregoing fees).

It is important to highlight that debtors benefitting from this moratorium are not permitted to distribute profits, make returns of capital, repurchase own shares or pay any other type of remuneration to their shareholders until the moratorium has ended. This restriction by its very nature only applies to legal persons.

Effects of the moratorium on leased properties

If the property used in a tourism activity is subject to a lease agreement, the debtor (in its capacity as lessor) must grant the lessee a moratorium on the payment of the rent for a minimum of 70% of the amounts that are benefitting from the moratorium under the financing agreement, unless the lessor and the lessee have previously agreed any equivalent moratorium.

Furthermore, if the lessor has not suffered the financial difficulties described above but the lessee has, the lessee may apply to the lessor for the moratorium and must provide it with all the supporting evidence.

If the moratorium is granted to the lessee, it will be subject to the restrictions on shareholder remuneration detailed above.

This newsletter provides preliminary comments on the most significant implications of the moratorium approved by RDL 25/2020 but is not a comprehensive description or summary of all its provisions, nor is it legal advice for any specific company, project or transaction.

Our Real Estate and Finance Practice Areas will be pleased to provide further information or specific legal advice upon request. Please contact:

Diego Armero
Partner
+34 91 586 45 98
diego.armero@uria.com

Ángel Pérez
Partner
+34 91 586 06 34
angel.perez@uria.com

Borja Contreras
Senior Associate
+34 91 586 04 49
borja.contreras@uria.com

José-Félix Zaldívar
Senior Associate
+34 91 586 06 12
josefelix.zaldivar@uria.com