

Abengoa subsidiary to face first creditor-forced insolvency proceedings

José Carles Delgado and Carlos Cuesta Martín report on the opening of insolvency proceedings against a subsidiary of global biotechnology company Abengoa in Spain



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Commercial Court nr. 2 of Seville has granted the opening of insolvency proceedings against Abengoa’s subsidiary, ‘Simosa IT’, after the petition submitted by one of its commercial creditors. It was the first time the Commercial Court agreed, since other creditors had also tried this measure against other companies of the group, with no success.

Is the situation of insolvent ‘Simosa IT’ the prelude of what will happen with the rest of the Spanish group?

Question of insolvency

Spanish Abengoa’s mid-year 2018 financial report¹ shows a total debt of 7,496.98 million Euro, out of which 5,182.60 million Euro is short term debt and 1,534.89 million Euro is debt towards commercial creditors. Besides, Abengoa’s average payment period amounted in 2017 to 463 days, which means that the company did not comply with the Spanish laws on delinquency². Does this mean that the Spanish company is insolvent?

Last April 6, 2016, Commercial Court number 2 of Seville (Spain) approved the group’s master restructuring agreement reached between Abengoa, its subsidiaries (including ‘Simosa IT’) and its financial creditors. Back then, the “*homologación*” of the refinancing agreement was perceived as good

news, although the refinancing agreement only bound financial creditors. Not commercial creditors.

Nevertheless, the Spanish Insolvency Act defines insolvency as the situation in which the debtor is no longer able to duly fulfil its overdue payment obligations (“*current insolvency*”) in a regular manner. Therefore, as Abengoa and its subsidiaries were not able to duly fulfil their payment obligations towards the commercial creditors – according to the Spanish press since 2015 – the group (or, at least, some of its companies) was technically insolvent. This resulted in the group’s need to reach bilateral agreements with their commercial creditors, one by one.

The technical insolvency of Abengoa’s group, as defined by the Spanish Insolvency Act, was aggravated after the ruling of Commercial Court number 2 of Seville of September 25, 2017, which decided the fate of the appeal that challenged the Court-approval of the master restructuring agreement. This ruling dictated that some creditors, such as the bondholders, stated they were not to be bound by the refinancing agreement because the Court considered, back then, that they had been forced to make a “*disproportionate sacrifice*” under the refinancing agreement.

Insolvency petition

In this micro-economic context, at the beginning of 2018, a French

commercial creditor, Sopra Steria, filed a compulsory insolvency petition referring to Abengoa’s subsidiary ‘Simosa IT’³.

Other creditors of other companies of the Abengoa group followed and tried to have other subsidiaries declared insolvent, such as:

- 1) Indes Technics & Solutions vs. Abengoa’s subsidiary Abener, for unpaid works in Poland since 2015 (Commercial Court nr. 2 of Seville)⁴.
- 2) Bondholders that were not bound by the refinancing agreement due to its “*disproportionate sacrifice*” vs. Abentel (Commercial Court nr. 2 of Seville, rejected by the Court)⁵.
- 3) Bondholders that were not bound by the refinancing agreement due to its “*disproportionate sacrifice*” vs. Asa Desulfuración (Commercial Court nr. 1 of Bilbao)⁶.

Of all these proceedings involving companies of the group, Commercial Court nr. 2 of Seville⁷ has opened, for the first time, insolvency proceedings of an Abengoa company at the request of a creditor, known now as the creditor-forced proceedings (“*concurso necesario*”) of ‘Simosa IT’, despite the initial opposition motion of the insolvent debtor ‘Simosa IT’.

Under Spanish law, the ruling opening the insolvency proceedings of ‘Simosa IT’ does

not decide yet on the liability of the directors. But there will be a separate side issue inside the Spanish “*concurso de acreedores*”, under which the liability of the directors and the *de facto* administrators must be analysed and could affect Abengoa itself. Mainly, because Abengoa was the sole administrator of its subsidiary until the opening of the forced proceedings, which implied the Court removing Abengoa as sole director of ‘Simosa IT’ and substituting it by the insolvency practitioner Ernst and Young.

Director’s liability

One of the reasons that implies the director’s liability, under the Spanish Insolvency Act, is that the director aggravated the insolvency situation of the company due to not filing for an insolvency petition in due time (art. 165.1 states this delay as a *iuris tantum* presumption for liability). According to the Spanish media, the insolvency would go back to 2015 in this case – almost four years ago – versus the two-month term imposed by the Spanish Insolvency Act (art. 5.1).

Other facts could be taken into account towards the liability of Abengoa. For example, if it is proved that the lack of payment goes back to 2015. The Court-approved master refinancing agreement could have implied, together with the lack of deposit of its Annual Accounts in due time⁸, an attempt of the group to simulate a false situation of solvency. This could also trigger Abengoa’s liability under art. 164.2.6° of the Spanish Insolvency Act, in this case, a *iuris et de iure* presumption for the liability of Abengoa as sole director. Most clearly, if it is proved, as it has been claimed, it will show that ‘Simosa IT’ was a front company for its parent company and that Abengoa has used the subsidiary to avoid paying its obligations⁹. In this respect, Abengoa subsidiary’s basic purpose was to provide Abengoa and the group with IT & Telecoms services.



Criminal actions

Finally, the insolvency practitioner of ‘Simosa IT’ could also pursue the criminal actions of the directors and the *de facto* administrators against ‘Simosa IT’ and Abengoa if it understood that the insolvency was created knowingly (arts. 259 and 260 of the Spanish Criminal Code).

Consequently, we will have to follow closely the insolvency proceedings of ‘Simosa IT’, to which Carles Cuesta Abogados is the counsel of the creditor that forced the insolvency proceeding, in order to understand what specific implications could arise for Abengoa and the rest of the group. ■

Footnotes:

- 1 Mid-year report “*Estados financieros intermedios resumidos consolidados a 30 de junio de 2018*” published by Abengoa.
- 2 See article 4.3 of *Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales* (Law on measures against delinquency in commercial transactions) that dictates a maximum payment period, on a case by case basis, of 60 calendar days. In this respect, the Spanish Supreme Court has ruled (ruling of November 23, 2016) on the mandatory nature of these 60 days, stating that

“all those facts that exceed that time limit, 60 calendar days, result null and void by contravention of the provisions of the mandatory rule (Article 6.3 of the Civil Code)”.

- 3 “El juez declara por vez primera el concurso necesario de una filial de Abengoa, Simosa IT” published by Voz Pópuli (Alberto Ortín) on November 16, 2018.
- 4 “Los proveedores de Abengoa se rebelan: un acreedor insta el concurso de Abener” published by Voz Pópuli (Alberto Ortín) on January 25, 2018.
- 5 See “Los jueces admiten a trámite demandas de concurso necesario de dos filiales de Abengoa” published by El País (Miguel Ángel Noceda) on March 7, 2018 and “El juez de Abengoa allana el camino para que Ericsson entre en Ezentis” (Miguel Ángel Noceda) on May 23, 2018.
- 6 See “Los jueces admiten a trámite demandas de concurso necesario de dos filiales de Abengoa” published by El País (Miguel Ángel Noceda) on March 7, 2018.
- 7 The same Court that ruled on the approval of the master restructuring agreement and its challenge.
- 8 Public information on ‘Simosa IT’ registered under the Commercial Registry of Seville proves that the Annual Accounts for 2016 were deposited in February 2018, while Spanish law provides they should have been deposited before the end of July, 2017.
- 9 “Abengoa subsidiary’s insolvency order raises questions over refinancing” published by Global Restructuring Review (Declan Bush) on November 16, 2018.



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