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Insolvency proceeding of Abengoa's Mexican subsidiary

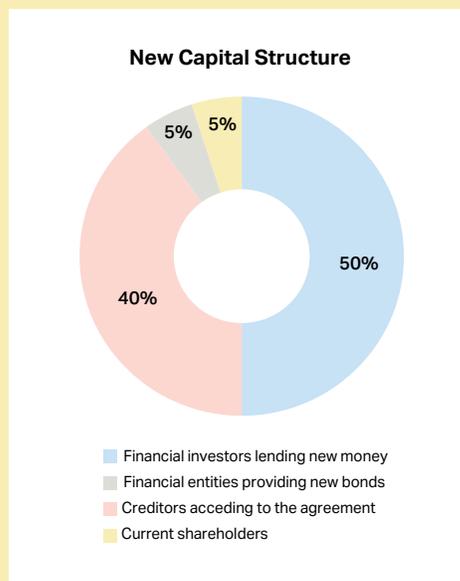
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Overview of Completed Spanish Proceedings

On March 31, 2017, Abengoa, S.A. (“Abengoa”), a Seville-based green energy technology-focused conglomerate, concluded its insolvency process in Spain. Abengoa’s restructuring included multiple parallel in-court proceedings in the U.S., as well as Brazilian and Mexican proceedings.

Abengoa’s restructuring began in November 2015, with the company’s pre-insolvency filing with the Spanish securities regulator, upon its failure to attract new investors and lenders and satisfy its liquidity needs. By September 2016, Abengoa made available to creditors its proposed restructuring agreement, which was later revised in February 2017. Abengoa’s project debt and corporate financing as of December 31, 2016 was approximately €9.7 billion.

Early in 2017, at the close of its supplemental accession period, during which existing creditors could accede to the restructuring agreement, Abengoa received support from 94% of its financial creditors. As part of the restructuring agreement, Abengoa issued warrants and executed share capital increases in a nominal aggregate amount of approximately €34.8 million, leaving pre-existing shareholders with only 5% of Abengoa’s equity post-capital increase. Total financial commitments were €1,170 million of new money and €307 million of new bonds.



	Standard Restructuring Terms	Alternative Restructuring Terms for Acceding Creditors
General	Preexisting debt reduced by 97% of its nominal value.	30% of the nominal value of outstanding debt converted into a new bond or loan (ranked senior or junior depending on whether or not each creditor participates in the new money facilities)
Maturity	Remaining 3%: 10 years	Senior debt: 5.5 years and junior debt: 6 year; with possible extension of up to 2 years.
Annual Coupon	None.	0.25% cash annually plus 1.25% "pay if you can" on an annual basis subject to certain conditions being met; otherwise capitalized and paid at maturity.
Capitalization Option	None.	For remaining 70% of the nominal value of outstanding debt in exchange for 40% of shareholders equity of the new Abengoa to be distributed among existing financial creditors.

Source: Abengoa website at http://www.abengoa.es/web/en/accionistas_y_gobierno_corporativo/financial-restructuring-proposal-viability-plan/preguntas-respuestas/.

As a result of not having the financial support of their parent company, Abengoa's subsidiaries in the U.S. and Brazil filed insolvency proceedings of their own. Abengoa's U.S. subsidiaries and affiliates are currently in the process of their Chapter 11 plan, while the Brazilian subsidiary has creditors' meetings scheduled for May and June of this year in order to approve the restructuring plan of the Brazilian subsidiary.

As for Abengoa, recent local news have reported that the company has hired Boston Consulting as its adviser for the company's new business strategy upon conclusion of Abengoa's refinancing process.

Ongoing Mexican Proceedings

Abemex Involuntary Insolvency

Abengoa's Mexican subsidiary, Abengoa Mexico, S.A. de C.V. ("**Abemex**") defaulted on its Mexican Peso-denominated local short-term bonds in November 2015. On July 25, 2016, the Mexican bankruptcy court accepted creditor Banco Base's request for Abemex's involuntary insolvency.

Challenges to the Insolvency Determination and the "Generalized Insolvency" Principle

Subsequently, the Federal Institute of Specialists in Bankruptcy Procedures (IFECOM) appointed

a *visitador* to verify that Abemex had met the two requirements for a bankruptcy declaration: (i) liability in arrears for over 30 days, accounting for at least 35% of the debtor's total liabilities and (ii) debtor having insufficient assets to service 80% of defaulted liabilities. Unlike involuntary Chapter 11 filings, where at least three or more creditors are required, unless there are fewer than 12 creditors, Mexican involuntary insolvency proceedings can be filed in connection with payment defaults under claims of at least two creditors. The appointed *visitador* determined that Abemex should not have been declared bankrupt as it did not meet one of the two requirements since past-due liabilities did not account for at least 35% of the debtor's total liabilities.

On December 16, 2016, the Mexican court ruled in favor of declaring Abemex bankrupt despite the *visitador* reports being binding to such court. The court based its decision on the fact that, under Mexican bankruptcy laws, bankruptcy may also be declared if an assumption of "generalized insolvency" can be proved when the company's assets are not sufficient to service its past due liabilities.

Precautionary Measures

As precautionary measures to protect creditors, the court prohibited Abemex from paying any liabilities

defaulted before July 25, 2016, and selling, transferring or granting as collateral any of its property or assets. Unlike debtor-in-possession financing in the U.S., in Mexico, once precautionary measures are provided to creditors, a debtor may not grant a first priority lien on an encumbered property to secure a new loan.

In January 2017, Banco Base requested an extension of precautionary measures, which would apply to the Abent 3T (A3T) project, a 220-megawatt cogeneration plant in the state of Tabasco in its final phase of construction. Banco Base's request sought to prevent Abengoa from granting the A3T shares as partial collateral of its secured financing, as contemplated by Abengoa's restructuring plan, and to obtain additional assets to cover amounts owed to Mexican creditors. However, the court denied such request by ruling that A3T is owned by a third party, and therefore excluding it from Abemex's insolvency proceeding. Accordingly, Abengoa granted such shares as collateral of its financial restructuring plan.

Creditor List Determinations

On March 17, 2017, two months after the conciliation period began and after having submitted a preliminary list of creditors in mid-February, the conciliator filed a final list of creditors. The conciliator modified the classification of parent Abengoa from subordinated creditor to common creditor in the final list of creditors. Given that Abengoa is a controlling company of Abemex, it falls under an exception of the definition of subordinated creditors pursuant to the Mexican Bankruptcy Law and should be considered a common creditor. Related-party claims are generally classified as subordinated, and when such claims represent 25% or more of the total claims, such subordinated creditors may not cast a vote in the voting to approve the financial restructuring plan. Under such rationale, despite recognizing Abengoa as a common creditor, the conciliator determined that parent Abengoa should be excluded from voting.

On April 11, 2017, the court published the creditors ruling (*sentencia de reconocimiento, graduación y prelación de créditos*)², which officially recognized

the creditors, by type and amounts owed. This ruling contained some unusual determinations:

- Confirmation of the conciliator's recognition of Abengoa as common creditor (i.e. not subordinated).
- Recognition of Banobras as Abemex's secured creditor. The court concluded that Banobras, that financed the Zapotillo aqueduct project in December 2014, should be included as a creditor because Abemex pledged 40% of its shares in April 2015 to guarantee such financing. The conciliator argued that he had not included Banobras as a creditor since there is no outstanding payment claim under such financing. Nevertheless, the court noted that considering Abemex's obligations as guarantor under such financing are still outstanding, Banobras should be recognized as a creditor.

On April 17, 2017, the bankruptcy court modified the creditor list in order to exclude Deutsche Bank Trust Company Americas as a common creditor, as trustee of certain bond issuances of Abengoa and its subsidiaries, to which Abemex is a guarantor. The court explained that it had mistakenly added Deutsche Bank to the creditor list dated April 11, 2017 and Deutsche Bank's claims should not be recognized considering they could not be accurately quantifiable.

Restructuring Plan Negotiations

In early February 2017, news reports covered Abemex's meetings with local short-term bondholders. Abemex held a meeting with local short-term bondholders and proposed to repay the principal of their defaulted notes in full over a period of 4.5 years. Abemex had previously reached a preliminary restructuring agreement with the majority of its bond creditors in November 2016; however, such agreement was subject to certain conditions, including avoiding bankruptcy. Abemex and the majority of the local bondholders in 13 of the 16 defaulted local short-term bond issuances agreed to a new preliminary restructuring plan, amending the previously agreed plan, and entering into a standstill agreement where they agreed to vote in favor

of the plan and to refrain from enforcing remedies. As expected, Banco Base, that filed for Abemex's involuntary insolvency proceeding, rejected the proposed restructuring plan. In order to approve a final restructuring agreement, Abemex will need the approving vote of at least 50% of its common creditors.

On April 18, 2017, Abemex announced that it had executed an accessory restructuring agreement with 71.3% of its creditors, including bondholders, financial creditors and suppliers. Such percentage excludes intercompany creditors. However, to date it is unknown whether Banco Base approved such agreement. Abemex stated that the accessory restructuring agreement, which provides that all creditors would be treated equally and that the payment of debt would be scheduled from March 2018 through December 2021, will be the base of the final restructuring agreement. Further details of the restructuring plan are not yet publicly available.

Next Steps

Recent news reports have indicated that appeals to the ruling are expected from Abemex and/or its creditors, especially Banco Base challenging, among other things, the recognition of Abengoa as common creditor, which would allow Abengoa's loan to be paid with the same priority as all other common claims, rather than with all subordinated claims. It is uncertain whether the executed accessory restructuring agreement, which sets forth that all creditors will be treated the same, will provide for the payment of both common and subordinated claims with the same priority.

With the creditors ruling, Abemex and its creditors can officially proceed to vote on a final restructuring plan. Abemex will have until the end of the 180-day conciliation period to move forward to such voting, which could be delayed by potential appeals and extensions to the conciliation period. Nevertheless, having secured 71.3% of creditors' votes, Abemex may succeed in obtaining approval of a final restructuring plan, despite Banco Base's lack of support.

Timeline of the Mexican Proceeding



1. Lourdes Elizondo wrote this contribution while an international lawyer at Cleary Gottlieb and at time of publication has returned to Ritch, Mueller, Heather y Nicolau, S.C. as an associate.
2. A copy of such ruling is available at the IFECOM's website: <http://www.ifecom.cjf.gob.mx/resources/PDF/detJudiciales/Abengoa/639.pdf>