

EMEA DC Meeting Statement 8 December 2015

Summary

The DC met on 8 December 2015 to continue its discussion of whether a Bankruptcy Credit Event had occurred with respect to Abengoa S.A. (the **Reference Entity**) as a result of the filing by the Reference Entity of a communication pursuant to Article 5bis of the Spanish Law 22/2003 of 9 July 2009 on insolvency (Ley 22/2003 de 9 de julio, Concursal), as amended (respectively, **Article 5bis** and the **Spanish Insolvency Law**)¹.

The DC resolved:

- (a) to treat the DC Question as separate requests in respect of (i) 2014 Transactions and (ii) Updated 2003 Transactions²;
- (b) that a Bankruptcy Credit Event had not occurred with respect to the Reference Entity in relation to 2014 Transactions;
- (c) that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to Updated 2003 Transactions; and
- (d) that the date of the Bankruptcy Credit Event with respect to the Reference Entity in relation to Updated 2003 Transactions is 25 November 2015.

Capitalised terms used but not defined in this Meeting Statement have the meanings given to them in the Credit Derivatives Determinations Committees Rules (March 13, 2015 version) (the **DC Rules**).

Effect of filing an Article 5bis communication

In its discussions, the DC considered the nature of the filing of an Article 5bis communication and the effect it has on the debtor filing it.

In circumstances where the relevant debtor has entered into restructuring negotiations with its creditors, Article 5bis allows the debtor to request from the court a three-month grace period (plus another month) in order to conclude those negotiations and to attempt to resolve its financial difficulties informally with its creditors. This is the so-called “Article 5bis communication” (the procedure is also referred to as *preconcurso*). The debtor need not be insolvent at the time it files an Article 5bis communication, though it must at least be in a period of financial difficulty with a risk of insolvency in the near future. The filing of an Article 5 bis communication is merely acknowledged by the relevant court clerk.

During this three-month period, the duties of the directors of the debtor do not change and the obligations of the debtor continue to fall when due, though the debtor’s obligation to file for insolvency is suspended (and creditors may not apply for the insolvency of the debtor, in the event that the relevant requirements under the Spanish Insolvency Law are met). If the debtor is solvent after the three months, it is not required to file for an insolvency declaration. However, if its difficulties cannot be resolved within the three-month period (i.e. the debtor is insolvent after the three months) the debtor must file an insolvency request (*solicitud de concurso*) no later than one month after the conclusion of the three-month period. In any event, once the

¹ The details of the Article 5bis communication are available on the Reference Entity’s website:

http://www.abengoa.com/export/sites/abengoa_corp/resources/pdf/gobierno_corporativo/hr_y_otras_comunicaciones_cnmv/hechos_relevantes/2015/20151127_hr_en.pdf

² In accordance with the DC Rules, “Updated 2003 Transaction” means a March 2009 Supplement Transaction or a July 2009 Supplement Transaction (and not a Credit Derivative Transaction incorporating the 2014 Definitions as a result of the ISDA 2014 Credit Derivatives Definitions Protocol).

debtor has filed a communication under Article 5bis, it cannot file such communication again during the following 12 months.

In addition, during the relevant period, no enforcement proceedings may be commenced in respect of any of the debtor's assets necessary for the continuation of its business. During this period, any legal proceedings initiated before the filing will be suspended.

Further, regardless of whether the relevant assets are deemed to be necessary for the continuation of the debtor's business, no individual financial creditor may initiate enforcement action in respect of those assets (and those already initiated will be suspended) if creditors holding 51% or more of the financial liabilities of the debtor (by value) have agreed to negotiate a refinancing agreement with the debtor and have agreed not to bring new or to continue on-going enforcement actions against it while negotiations continue. However, commercial and public law claims (such as claims brought by or on behalf of the Spanish Tax Administration or the Labour Authorities) may still be brought in this period. The debtor would normally distribute a circular to each of its financial creditors upon filing an Article 5bis communication, to be countersigned and returned by each such creditor in order to provide its express consent. This prohibition would not apply in respect of financial collateral arrangements.

Throughout the periods of restricted enforcement, secured creditors remain entitled to bring enforcement proceedings against any assets secured in their favour at any time although, if any such proceedings are initiated against assets necessary for the debtor's business activity, they will be suspended immediately. Similarly, the fact that the debtor's payment obligations are not suspended means that any default in respect of them can be addressed and accelerated, if applicable. The protections of Article 5bis do not prevent acceleration, though they do prohibit enforcement in accordance with the foregoing.

Whether a Bankruptcy Credit Event has occurred in relation to 2014 Transactions

Limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions provides as follows:

“the Reference Entity... institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other similar relief under any bankruptcy or insolvency law or other law affecting creditors' rights...”

The DC was of the view that the Reference Entity having filed an Article 5bis communication with the relevant court would constitute the “[institution of] a proceeding”. The law under which the Article 5bis communication is filed is the Spanish Insolvency Law, which is an insolvency law. The DC Question in relation to 2014 Transactions therefore turned on whether the relief sought was “similar” to that of a “judgment of insolvency or bankruptcy”. (The DC considered other limbs of the Bankruptcy Credit Event definition but found them not to be relevant.)

The DC was (in the majority) of the view that the relief granted by the filing of the Article 5bis communication is not a relief sufficiently similar in effect to that of a judgment of insolvency or of bankruptcy, and noted a number of points in reaching this conclusion. The effect of the filing is for the Reference Entity to avail itself of the Article 5bis court protection, providing some relief for certain of its assets or, as the case may be, from certain of its creditors. However, the relief granted is predominantly in respect of certain assets. Further, it is by virtue of a suspension of enforcement of claims and security; filing an Article 5bis communication does not suspend payment obligations, and prevents neither acceleration of obligations nor the bringing of a claim. The relief under Article 5bis is also limited in time to three months (plus one month).

The DC also noted a number of differences between the effect of filing an Article 5bis communication (*preconcurso*) and the effect of initiation of an actual declaration of insolvency under the Spanish Insolvency Law (*concurso*):

- (a) A declaration of insolvency entails the appointment of the insolvency administrator, who may either intervene or directly exercise the management of the debtor. Filing an Article 5bis communication does not have any impact on the management of the debtor.
- (b) Most payment obligations outstanding at the date of an insolvency declaration are forbidden (with very limited exceptions) until a creditors' composition is reached or they are otherwise paid by the liquidation of the debtor. Creditors must file a claim with the Spanish courts for the debt or payment obligation owed by the debtor within one month from the date of publication in the Spanish Official Gazette of the declaration of insolvency. The declaration of insolvency entails other limitations on rights of creditors, such as a general prohibition to apply set off, the suspension on accrual of interest (except for secured creditors up to the value of the security), and the suspension of retention rights and statute of limitations. Filing an Article 5 bis communication does not have any impact on the debtor's need to comply with contracts and payment obligations.
- (c) Under both *preconcurso* and *concurso*, neither secured nor unsecured creditors may enforce against assets necessary for the debtor to continue its business. Under *preconcurso*, both secured and unsecured creditors may enforce against any other asset (subject to the exception where creditors holding 51% or more of the financial liabilities of the debtor (by value) have agreed to negotiate a refinancing and not to enforce). Under *concurso* on the other hand, only secured creditors may enforce against any such other asset, and unsecured creditors are subject to a total prohibition on enforcement against all assets. (Notwithstanding the foregoing, financial collateral arrangements are enforceable by all creditor types in both *preconcurso* and *concurso*.)
- (d) In addition, *concurso* proceedings include reliefs, amongst others, such as no accrual of interest on late payments, the ability of the insolvency administrator to rehabilitate credit agreements, specific terms for terminating contracts, and no obligation to address insolvency claims outside a composition or liquidation scenario. All these reliefs are not included under Article 5bis. The relevant moratoriums on enforcement under *concurso* also last one year.

The DC also noted distinctions between the filing of an Article 5bis communication and the French *sauvegarde* proceedings, a pre-insolvency procedure which the DC had previously found to constitute a Bankruptcy Credit Event in relation to Thomson S.A.³ Unlike under the *sauvegarde* procedure, no official (in the case of *sauvegarde* proceedings, a *sauvegarde* administrator) is appointed in respect of the relevant debtor pursuant to the filing of an Article 5bis communication (by the court or otherwise) and *sauvegarde* proceedings are commenced by a decision of the court, as opposed to just a filing by the debtor. Significantly, *sauvegarde* proceedings also entail a markedly greater restriction on creditors' rights, in the form of a freeze on debt payment, the acceleration of debt and the enforcement of security, together with specific creditor filing requirements (creditors of the debtor must file a proof of claim for all unpaid claims as at the date of opening of the *sauvegarde* proceedings, and filing generally must be made within two months of the date of the court order opening the *sauvegarde* proceedings). Finally, *sauvegarde* proceedings are universal in their application as opposed to applying to certain identified creditor groups.

Also, the DC took account of the question submitted to the DC regarding the appointment of the Fund for Orderly Bank Restructuring (*Fondo de Reestructuración Ordenada Bancaria*) in respect of Caja de Ahorros del Mediterráneo⁴, where the official appointed was determined not to be "similar" to those listed in limb (f) of the Bankruptcy Credit Event definition based on its limited ability to interfere with creditors' rights.

The DC was (in the majority) of the view the filing of an Article 5bis communication is therefore a limited relief that would be afforded to a debtor and not one that is "similar" to a judgment of insolvency or bankruptcy for purposes of limb (d) of the Bankruptcy Credit Event definition under the 2014 Definitions.

³ <http://dc.isda.org/cds/thomson/>

⁴ <http://dc.isda.org/cds/caja-de-ahorros-del-mediterraneo/>

Accordingly, the DC resolved that a Bankruptcy Credit Event had not occurred with respect to the Reference Entity in relation to 2014 Transactions.

Whether a Bankruptcy Credit Event has occurred in relation to Updated 2003 Transactions

Limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the Updated 2003 Definitions provides as follows:

“a Reference Entity...institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights...”

In accordance with its view in relation to 2014 Transactions, the DC was of the view that the relevant Reference Entity having filed an Article 5bis communication with the relevant court would constitute the “[institution of] a proceeding”, and that the law under which the Article 5bis communication is filed is an insolvency law. Under the Updated 2003 Definitions, the additional requirement in order to constitute a Bankruptcy Credit Event is that the relief sought be “a judgment of insolvency or bankruptcy or any other relief” (emphasis added). Unlike under the 2014 Definitions, there is no requirement in the wording of the provision that the relevant relief be similar to a judgment of insolvency or bankruptcy.

The DC noted the distinction in drafting between the 2014 Definitions and the Updated 2003 Definitions and was (in the majority) of the view that the relief sought pursuant to the filing of an Article 5bis communication did constitute such “other relief”, considering the enforcement restrictions resulting from the filing of such Article 5bis communication.

Accordingly, the DC resolved that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to Updated 2003 Transactions. The DC agreed to hold a vote by email on a future date to be determined as to whether or not to hold an Auction in relation to Updated 2003 Transactions.