

Acquisition of a business from an insolvent company and the importance of doing a good due diligence

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A company that had acquired a business from an insolvent company requested the insolvency court to annul the SPA because of an alleged error about the liabilities it had assumed.

The SPA provided that the buyer would only assume certain labour and social security obligations of the insolvent company, excluding those arisen before the transfer of the business. However, shortly after completion of the transaction and despite the contractual provision, two labour courts ordered the buyer to pay the severance compensations corresponding to some workers who had been dismissed before the execution of the SPA.

The insolvency court rejected the buyer's annulment claim and the Court of Appeal of Seville (CAS) confirmed¹ the decision. The CAS noted that:

- (i) Any diligent purchaser of a company or a business must carry out a due diligence to identify and cover possible contingencies and risks and to determine the purchase price. This applies *a fortiori* to the purchaser of a business from an insolvent company.
- (ii) The Workers' Statute clearly provides for (a) the subrogation of the acquirer of a business to the seller's labour and social security obligations and (b) the joint and several liability of both seller and buyer in regard to labour obligations originated before the transfer².

Insolvency is not an exception to this rule³.

- (iii) Therefore, thanks to the due diligence analysis that its advisers must have conducted, the buyer should have known that by acquiring the business it was becoming jointly and severally liable for the pre-transfer labour obligations of the insolvent company.

Based on the above, the CAS concluded that there was no error on the part of the buyer as to the liabilities assumed and that even if there was one (either because no due diligence was carried out or because the buyer's advisers failed in their legal analysis) it would be an inexcusable error.

¹ Judgment of the Court of Appeal of Seville 706/2020 dated 9 December 2020.

² Article 44 of the Workers' Statute.

³ Article 149.4 of the previous Insolvency Act.