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# MEXICANA AIRLINES, ONE OF THE WORLD'S OLDEST AIRLINES, FILES FOR BANKRUPTCY PROTECTION IN MEXICO AND THE UNITED STATES AND SUSPENDS FLIGHTS UNTIL FURTHER NOTICE

*Lina Forero-Niño\**

**I**MAGINE traveling to Bogotá, Colombia for a summer family vacation. While on vacation, you receive an email from your airline carrier notifying you that it has filed for bankruptcy and is consolidating some of its flights. You are concerned about whether your return flight is in jeopardy so you immediately confirm your flight number against the information provided in the email and find that your flight does not appear to be affected.

When you arrive at the airport on the day of your flight, you are informed by an employee of the airline that you will not be able to fly out of Bogotá. The reason for this is because only one plane is permitted to fly per day and only the first 150 passengers that arrived at the airport had a seat on the plane. You were not within that group of 150. Unable to get more information about when you could expect to fly, you decide to leave the airport and return to a relative's house. Fortunately, three days later, your airline honored your tickets and you were able to travel back to the United States on August 17, 2010. Only eleven days later on August 28, 2010, your airline suspended all of its flights until further notice.<sup>1</sup>

In this case note, I will provide a history of Mexicana Airlines (Mexicana), explain the factors that led to the airline's downfall, review Mexicana's insolvency proceedings under Mexico's Law of Commercial Bankruptcy and under Chapter 15 of the U.S. Bankruptcy Code, and predict whether the airline will be back in the air.

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1. This scenario is based on the real life experiences of the author's family. The story served as the primary inspiration for writing this case note and learning about bankruptcy law.

## I. HISTORY OF MEXICANA AIRLINES

Mexicana Airlines was established in Mexico City on July 12, 1921 under the name *Compañía Mexicana de Transportación Aérea* (Mexican Company of Air Transportation).<sup>2</sup> It began operations with four Lincoln Standard airplanes capable of carrying one passenger and fifty kilograms of cargo and mail while traveling at ninety-five kilometers per hour.<sup>3</sup> The first services the airline provided were the shipment of mail and aerial photography.<sup>4</sup> Americans piloted Mexicana's first flights for passengers.<sup>5</sup>

In 1924, the airline had new American owners and was formally known as *Compañía Mexicana de Aviación S.A.* (Mexican Aviation Company).<sup>6</sup> Mexicana was the first airline in Mexico to receive the Mexican government's permission to service a route from Mexico City to Tampico.<sup>7</sup> In 1929, Pan American Airways purchased stock in Mexicana and Mexicana began to service international routes.<sup>8</sup> The renowned American aviator, Charles A. Lindbergh, piloted Mexicana flights and participated in the restructuring of the airline.<sup>9</sup> Mexicana was the first international airline to service a flight from Brownsville to Guatemala in 1930.<sup>10</sup> During the 1930s, several other international routes were added, including a route to Los Angeles, California.<sup>11</sup> During the 1940s and 1950s, the company experienced steady growth as it added national and international flights, and acquired more sophisticated aircraft for its fleet.<sup>12</sup> Mexicana gained popularity as celebrities such as Marilyn Monroe took international flights onboard Mexicana planes.<sup>13</sup> But fierce competition in the airline industry caused serious economic problems for Mexicana and in 1967 it was near bankruptcy.<sup>14</sup> Mexicana was saved from bankruptcy by Crescencio Ballesteros and other businessmen who purchased Mexicana's stock.<sup>15</sup> In 1970, the airline flew more than three million passengers.<sup>16</sup>

In 1982, economic turmoil in Mexico forced Ballesteros and the other

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2. *Historia de Mexicana de Aviación* [*History of Mexicana de Aviación*], TERRA.COM, <http://economia.terra.com.mx/herramientas/galerias/galeria.aspx?galeria=26> (last visited Sept. 26, 2010) (translated from Spanish).

3. *Id.*

4. *Id.*

5. *Mexicana, una Historia de Rescates* [*Mexicana, a History of Bailouts*], REUTERS, Aug. 27, 2010, <http://www.cnnexpansion.com/negocios/2010/08/27/mexicana-quebras-rescates-cnnexpansion> (translated from Spanish).

6. Martín Hernández & Jorge López, *Una Historia con Mucha Turbulencia* [*A Very Turbulent History*], EL UNIVERSAL, Aug. 28, 2010, <http://www.eluniversal.com.mx/finanzas/81631.html> (translated from Spanish).

7. *Mexicana, una Historia de Rescates*, *supra* note 5.

8. *Una Historia con Mucha Turbulencia*, *supra* note 6.

9. *Mexicana, una Historia de Rescates*, *supra* note 5.

10. *Historia de Mexicana de Aviación*, *supra* note 2.

11. *Una Historia con Mucha Turbulencia*, *supra* note 6.

12. *Historia de Mexicana de Aviación*, *supra* note 2.

13. *See id.*

14. *Una Historia con Mucha Turbulencia*, *supra* note 6.

15. *Mexicana, una Historia de Rescates*, *supra* note 5.

16. *Historia de Mexicana de Aviación*, *supra* note 2.

stockholders to sell Mexicana.<sup>17</sup> The Mexican government purchased fifty-four percent of Mexicana's stock.<sup>18</sup> In 1990, a group of Mexican investors called the Grupo Falcon became the new owner of Mexicana, but the Mexican government continued to maintain a thirty percent share interest.<sup>19</sup> Mexicana's new owners initiated a campaign to improve the company's image and to purchase new aero navigation equipment.<sup>20</sup> But in 1993, Mexicana's competitor, Aeroméxico, owned by private investors, purchased and operated Mexicana.<sup>21</sup>

As a result of an economic crisis in Mexico in 1995, Aeroméxico and Mexicana were both taken over by the Mexican government.<sup>22</sup> On May 23, 1995, the government created a company called CINTRA for the purpose of "operating, reforming, and selling the airlines."<sup>23</sup> In 2001, Mexicana added MexicanaClick as its low-fare domestic subsidiary.<sup>24</sup> In 2005, the government sold Mexicana for \$165.5 million to Grupo Posadas, a Mexican hotel company.<sup>25</sup> In 2007, Mexicana received numerous awards including "World Travel Awards' Best Airline Mexico and Central America for the eleventh year running, Best Business Class Latin America for the third year running, . . . and Best Airline in Mexico for two years running by Global Traveler magazine."<sup>26</sup> "Mexicana boarded 8.3 million passengers in 2008, with MexicanaClick carrying another 3.4 million."<sup>27</sup> In 2009, the airline industry was adversely affected by a "sharp decline of passengers" as a result of the economic recession and the H1N1 outbreak.<sup>28</sup> Nevertheless, Mexicana was distinguished as the "the leading carrier in Mexico and Central America" and joined the Oneworld Alliance on November 10, 2009, which placed it alongside the "best and biggest names in the airline business," including American Airlines, British Airways, and Iberia.<sup>29</sup> Mexicana and its subsidiaries "serve[d] fourteen countries and sixty-seven destinations, thirty-seven of them in Mexico."<sup>30</sup> Mexicana flew to forty-one destinations in fourteen countries in North America, Central and South America, and Europe, made more than 200 departures a day, and employed 8,400 staff.<sup>31</sup> It

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17. *Mexicana, una Historia de Rescates*, *supra* note 5.

18. *Una Historia con Mucha Turbulencia*, *supra* note 6.

19. *Mexicana, una Historia de Rescates*, *supra* note 5.

20. *Historia de Mexicana de Aviación*, *supra* note 2.

21. *Mexicana, una Historia de Rescates*, *supra* note 5.

22. *Id.*

23. *Id.*; CINTRA, Cintra.com, <http://www.cintra.com.mx/Defaulte.htm> (last visited Apr. 16, 2011) (translated from Spanish).

24. *Historia de Mexicana de Aviación*, *supra* note 2.

25. *Mexicana, una Historia de Rescates*, *supra* note 5.

26. Press Release, Oneworld Alliance Welcomes Mexicana on Board (Nov. 9, 2009), <http://www.oneworld.com/ow/news/details?objectID=19840&pdf=1&showhtml=0>.

27. *Id.*

28. *Mexicana, una Historia de Rescates*, *supra* note 5.

29. *Oneworld*, *supra* note 26.

30. *Id.*

31. *Id.*

“transported 11.1 million passengers in 2009.”<sup>32</sup>

In May 2010, Mexicana reported two consecutive years of economic losses and asked the Mexican government for assistance.<sup>33</sup> By August 2010, Mexicana reported its economic situation as critical and the Mexican government refused to bail out Mexicana.<sup>34</sup> On August 2, 2010, “amid labor unrest and mounting financial woes,” Mexicana filed for bankruptcy protection in Mexico and the United States.<sup>35</sup> The company suspended all ticket sales on August 4, 2010, and reduced its flights on August 8, 2010.<sup>36</sup> A group of Mexican investors, Tenedero K, acquired ninety-five percent of Mexicana’s stock on August 21, 2010 to “save the debt ridden company,” while the pilots’ union held the remaining five percent of shares.<sup>37</sup> On August 28, 2010, after eighty-nine years of continuous service, Mexicana suspended flights for all of its three airlines until further notice.<sup>38</sup>

## II. WHAT LED TO THE AIRLINE’S DOWNFALL?

Mexicana was able to overcome financial problems and a potential bankruptcy in the past, but this year, several factors combined to make the company unable to defeat its financial problems. According to court documents, the company reported four causes of its financial problems: “labor costs, high jet fuel prices, the swine flu outbreak in 2009, and the global economic recession.”<sup>39</sup>

In a press release, the company stated that non-competitive labor costs were the primary cause of the company’s losses “to the extent that it is now financially non-viable.”<sup>40</sup> Mexicana reported that even though it was successful in cutting back some of its operating costs, which produced savings in excess of \$800 million, this was not sufficient to offset its labor costs.<sup>41</sup> Mexicana’s operating costs, excluding labor costs for its pilots and flight attendants, were “30 [percent] lower than the average of legacy airlines in the U.S.”<sup>42</sup> But Mexicana considered its labor costs non-com-

32. Alexandra Olson, *Group Buys Controlling Stake in Mexicana Airlines*, ASSOCIATED PRESS, Aug. 21, 2010, <http://lawschool.westlaw.com> (on file with author).

33. *Mexicana, una Historia de Rescates*, *supra* note 5.

34. *Id.*

35. Patrick Fitzgerald, *Mexicana Airlines Files for Chapter 15 Bankruptcy in U.S.*, DOW JONES DAILY BANKR. REV., Aug. 3, 2010, <http://www.automatedtrader.net/real-time-dow-jones/9552/mexicana-airlines-files-for-chapter-15-bankruptcy-in-us>.

36. Press Release, CMA Suspends Ticket Sales, Continues Flying Normally (Aug. 4, 2010), <http://mexicanainforma.com/press-releases/?currentPage=2>; Press Release, Mexicana Airlines to Reduce Flights (Aug. 8, 2010), <http://mexicanainforma.com/press-releases/?currentPage=2>.

37. Olson, *supra* note 32.

38. Press Release, Grupo Mexicana Suspends Flights Until Further Notice (Aug. 27, 2010), <http://mexicanainforma.com/press-releases/2010/8/27/press-release-11-grupo-mexicana-suspends-flights-until-furth.html>.

39. Olson, *supra* note 32.

40. Press Release, Mexicana Airlines Informs (Aug. 2, 2010), <http://mexicanainforma.com/press-releases/?currentPage=3>.

41. *Id.*

42. *Id.*

petitive because statistics showed that Mexicana's pilots were paid "49 [percent] more than the average wage paid to pilots by airlines in the U.S. and 185 [percent] more than the average wage paid by other Mexican low-cost airlines."<sup>43</sup> Similarly, Mexicana's flight attendants earned "32 [percent] more than the U.S. average and 165 [percent] more than flight attendants for other Mexican airlines."<sup>44</sup> The company stated "that if [its] collective contracts had been more competitive, instead of registering losses of \$350 million from 2007 to date, the company would have posted profits of \$350 million."<sup>45</sup>

Mexicana offered its pilots' and flight attendants' unions two alternatives with hopes of lowering its labor costs, securing Mexicana's long-term financial viability, and ensuring its continued existence.<sup>46</sup> The first option involved negotiating a new "collective contract" with terms requiring pilots and flight attendants to accept cuts in wages of forty-one percent and thirty-nine percent, respectively.<sup>47</sup> In addition, cuts would be made to fringe benefits and the company would make a "40 percent reduction in employees."<sup>48</sup> The positive aspect about this option was that the company offered a "profit-sharing plan whereby the unions would get a percentage of any operating profits that exceed 5 [percent] of the company's total revenues."<sup>49</sup> Mexicana's stockholders realized that the unions had the power to reform the company's financial situation. Therefore, as part of the second option, the stockholders offered to sell the company to the pilots' and flight attendants' unions for the "token sum of one Mexican peso," which is equivalent to about eight U.S. cents.<sup>50</sup>

Mexicana and the unions negotiated a new collective contract pursuant to the first option after the airline filed for bankruptcy protection in Mexico and the United States.<sup>51</sup> But they were unable to reach an agreement that would allow the company to have long-term financial viability.<sup>52</sup> Leaders of the unions rejected the proposal because "their members already agreed to cuts in 2006."<sup>53</sup> Thus, the company was forced to suspend flights until further notice.<sup>54</sup> Mexicana's financial woes worsened because it continued operations in the interests of its passengers despite the fact that it was forced to suspend ticket sales and thus did not receive

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Olson, *supra* note 32.

48. *Id.*

49. Mexicana Airlines Informs, *supra* note 40.

50. *Id.*

51. Press Release, Pilots and Flight Attendants to Participate in Capital Stock of Grupo Mexicana (Aug. 10, 2010), <http://mexicanainforma.com/press-releases/>.

52. Grupo Mexicana Suspends Flights Until Further Notice, *supra* note 38.

53. Olson, *supra* note 32.

54. Grupo Mexicana Suspends Flights Until Further Notice, *supra* note 38.

revenues.<sup>55</sup>

### III. MEXICO'S COMMERCIAL INSOLVENCY PROCESS UNDER THE LAW OF COMMERCIAL BANKRUPTCY

The purpose of this section is to explain Mexico's *Concurso Mercantil* process which is Mexico's insolvency process regulated by the Law of Commercial Bankruptcy (hereinafter LCB). Mexico's insolvency process is a type of bankruptcy protection "that grants companies a reasonable timeframe in which to reorganize themselves in an orderly manner while continuing to operate."<sup>56</sup> The LCB is the "Mexican equivalent of Chapter 11" of the U.S. Bankruptcy Code.<sup>57</sup> Mexico's Law of Commercial Bankruptcy was enacted in 2000 and governs the "insolvency process for merchants, both individuals and legal entities."<sup>58</sup> This law covers "'cross-border insolvency cases' and incorporates the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency."<sup>59</sup> Mexico's insolvency process under the LCB:

[c]onsists of two consecutive stages: (i) the conciliation stage, of which the main purpose is facilitating the reorganization of debtors' debt in order to preserve their businesses as going concerns; and (ii) the liquidation stage, of which the main purpose is terminating merchants' businesses, selling their assets, and, with the proceeds derived from the sales, paying as much as possible of debtor's debt and equity.<sup>60</sup>

A company in financial distress seeking protection under the LCB is required to petition a judge for a declaration that the company is in *concurso mercantil*, meaning a formal declaration that a company has commenced the insolvency process.<sup>61</sup> The most notable legal consequences of a judge's declaration of insolvency are the suspension of any garnishment actions taken by a creditor and the prohibition from seizing the debtor's property.<sup>62</sup>

Under the LCB, a district judge in the city where the company seeking commencement of the insolvency process is domiciled has jurisdiction

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55. Press Release, Mexicana Airlines to Reduce Flights (Aug. 8, 2010), <http://mexicanainforma.com/press-releases/?currentPage=2>.

56. Press Release, Compañía Mexicana de Aviación Files for Insolvency Proceedings in Mexico and Bankruptcy Protection in the U.S. to Bring Cost Structure into Line with Market Conditions (Aug. 3, 2010), <http://mexicanainforma.com/press-releases/?currentPage=2>.

57. Fitzgerald, *supra* note 35.

58. Jonatan Graham-Canedo, *Comparative Analysis of Bankruptcy Legal Provisions from Mexico and the United States: Which Legal System is More Attractive?*, 6 DEPAUL BUS. & COM. L.J. 19, 19-20 (2007).

59. *Id.*

60. *Id.* at 20.

61. Ley de Concursos Mercantiles [L.C.M.] [Law of Commercial Bankruptcy], art. 20, Diario Oficial de la Federación [D.O.], 12 de Mayo de 2000 (Mex.) (translated from Spanish).

62. *Id.* art. 65.

over that company's insolvency process.<sup>63</sup> After accepting a company's petition for insolvency, the judge first issues an order to the *Instituto Federal de Especialistas de Concursos Mercantiles* (Federal Institute of Specialists on Insolvency Proceedings, hereinafter Institute), which is a branch of the *Consejo de la Judicatura* (Federal Judiciary Council).<sup>64</sup> The Institute was created through Article 331 of the LCB.<sup>65</sup> The main purpose of the Institute is to appoint individuals who satisfy the requirements under the LCB to carry out the roles of *visitador* (investigator), *conciliador* (mediator), and *sindico* (receiver), who are collectively referred to as "intervening parties" to the insolvency process.<sup>66</sup> Upon receiving the order from the judge, the Institute has five days to appoint an investigator to the insolvency process.<sup>67</sup>

The main role of the investigator is to go to the company's place of business to determine if the company satisfied the requirements to commence the insolvency process under the 2007 amended version of Article 10 of the LCB.<sup>68</sup> Under Article 10, a company seeking an insolvency process must show that it defaulted on its debt obligations with two or more different creditors and satisfy other certain conditions.<sup>69</sup> The investigator has authority to access the company's accounting records and other documents which are material to his or her final determination.<sup>70</sup> Upon completion of the investigation, the investigator must create a legal document stating his or her findings.<sup>71</sup> This document must be signed by a representative of the company and two witnesses.<sup>72</sup> Within fifteen days after the investigation is completed, the investigator must report to the judge whether the company should commence the insolvency process.<sup>73</sup> The day after receiving the investigator's judgment, the judge will provide the judgment to the company and the company's creditors.<sup>74</sup> The company and creditors will then have ten days to respond by presenting their written complaints.<sup>75</sup> After receiving the complaints, the judge will have five days to determine whether the company should commence the insolvency process.<sup>76</sup> Then, the judge will notify the following parties of his

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63. *Id.* art. 17.

64. *Id.* arts. 17, 311.

65. *Id.* art. 311.

66. *Id.*

67. *Id.* art. 29.

68. *Ley de Concursos Mercantiles [L.C.M.] [Law of Commercial Bankruptcy (amended)], as amended*, art. 30, *Diario Oficial de la Federación [D.O.]*, 27 de Diciembre de 2007 (Mex.).

69. *Id.* art. 10.

70. Gregorio Rodríguez Mejía, *Síntesis de la Ley de Concursos Mercantiles [Synthesis of the Law of Commercial Bankruptcies]*, 5 *REVISTA DE DERECHO PRIVADO [Private Law Magazine]* 167, 172 (2003) (on file with author) (translated from Spanish).

71. *Id.*; *Law of Commercial Bankruptcy (amended)*, art. 36.

72. Mejía, *supra* note 70.

73. *Law of Commercial Bankruptcy (amended)*, art. 40.

74. *Id.* art. 41.

75. *Id.*

76. *Id.* art. 42.



decision: the debtor, the Institute, the investigator, creditors, and other government entities.<sup>77</sup>

The parties officially enter the conciliation stage of the insolvency process on the day when the judge's declaration that a company has entered the insolvency process is published in the *Diario Oficial de la Federación* (Official Reporter).<sup>78</sup> The conciliation stage lasts for a period of 185 days.<sup>79</sup> But the debtor and certain creditors can petition the judge for a ninety-day extension.<sup>80</sup> Additional extensions may be granted, but the entire conciliation stage must not exceed 365 days.<sup>81</sup> The Institute appoints a mediator five days after the judge declares that a company has entered the insolvency process.<sup>82</sup> The mediator must give the judge a provisional list identifying the debtor's creditors and the amount owed to each creditor.<sup>83</sup> This list is created through the mediator's review of the company's accounting records and other relevant documents.<sup>84</sup> The mediator also reviews filings by creditors requesting the judge's formal recognition of their creditor status in the proceedings.<sup>85</sup> After the list is submitted to the judge, the debtor and creditors have the opportunity to review the list and make objections.<sup>86</sup> The mediator reviews the objections and submits the final list of creditors to the judge.<sup>87</sup> The judge uses the mediator's list to make a declaration formally recognizing the debtor's creditors.<sup>88</sup>

The main role of the mediator is to assist the debtor and creditors in reaching restructuring agreements so as to prevent the insolvency process from reaching the liquidation stage wherein the debtor is declared bankrupt and the debtor's company is sold to satisfy its debt obligations.<sup>89</sup> To this end, the mediator presents to the judge and the parties recommendations on studies and evaluations that should be performed for the purpose of inducing an agreement.<sup>90</sup> During the conciliation stage, the debtor's company shall continue to be operated by the debtor.<sup>91</sup> But the mediator has the authority to monitor the accounting and other operations of the debtor.<sup>92</sup> The judge will formally terminate the insolvency process if the debtor and creditors reach an agreement approved by the judge.<sup>93</sup>

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77. *Id.* art. 44.

78. *Id.* art. 145.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* art. 146.

83. *Id.* arts. 121, 123; Mejía, *supra* note 70, at 177-78.

84. Law of Commercial Bankruptcy (amended), arts. 121, 123.

85. *Id.*

86. *Id.* art. 129.

87. *Id.* art. 130.

88. *Id.* art. 132.

89. *Id.* art. 3; Mejía, *supra* note 70, at 173.

90. Law of Commercial Bankruptcy (amended), art. 151.

91. *Id.* art. 74.

92. *Id.* art. 75.

93. *Id.* art. 166.

The debtor will be declared *en quiebra*, or bankrupt, if one of the following occurs: 1) if the debtor requests to be declared bankrupt; 2) the debtor and creditors are unable to reach an agreement in the course of the conciliation stage; or 3) the mediator requests that the debtor be declared bankrupt.<sup>94</sup> Once the company is declared bankrupt, the parties enter the liquidation stage of the insolvency process where the judge will order the Institute to either re-assign the mediator as a receiver for the bankrupt company or to appoint a receiver.<sup>95</sup> One of the main roles of the receiver is to operate the bankrupt company.<sup>96</sup> The receiver has the right to take possession of the bankrupt company's assets.<sup>97</sup> Upon taking possession of the company's assets, the receiver shall take the necessary procedures to preserve the company's business.<sup>98</sup> The receiver has the duty to manage the bankrupt company as would a "diligent manager in his or her own business" and is responsible for any company losses resulting from the receiver's negligence.<sup>99</sup> The receiver must also give the judge various documents reporting on the company's financial and accounting status.<sup>100</sup> At the final step in the liquidation stage of the insolvency process, the receiver coordinates the sale of the bankrupt company to satisfy the company's debt obligations.<sup>101</sup>

#### IV. THE STATUS OF MEXICANA'S INSOLVENCY PROCEEDINGS IN MEXICO AND THE UNITED STATES

Mexicana filed a petition for an insolvency process with a Mexico City District Court on August 2, 2010.<sup>102</sup> The petition was admitted by a Mexican bankruptcy judge on August 4, 2010 and Mexicana was granted temporary injunctive relief "to prevent creditors from exercising their rights over [Mexicana's] outstanding debt obligations."<sup>103</sup> The Institute appointed an investigator to the insolvency process.<sup>104</sup> As required under the LCB, the investigator submitted to the judge a report on the financial status of Mexicana and whether it should be granted an insolvency

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94. *Id.* art. 167.

95. *Id.* art. 170.

96. *Id.* art. 178.

97. *Id.* art. 180.

98. *Id.* art. 183.

99. *Id.* art. 189.

100. *Id.* art. 190; Mejía, *supra* note 70, at 174.

101. Law of Commercial Bankruptcy (amended), art. 3; Mejía, *supra* note 70, at 174.

102. NOTA INFORMATIVA [INFORMATIVE NOTE], Juez Consuelo Soto del Juzgado Decimo Primer de Distrito en Materia Civil en el Distrito Federal Informa [Judge Consuelo Soto Informs Regarding a Civil Matter in the Eleventh District Court in the Federal District], 7 de septiembre del 2010, <http://www.cjf.gob.mx/documentos/notasInformativas/docsNotasInformativas/2010/notaInformativa16.pdf> (Mex.).

103. Press Release, Compañía Mexicana de Aviación's Petition for Insolvency Proceedings (Concurso Mercantil) has been Admitted (Aug. 5, 2010), <http://mexicanainforma.com/press-releases/?currentPage=2>.

104. Juez Consuelo Soto del Juzgado Decimo, *supra* note 102.

process.<sup>105</sup>

On September 7, 2010, the judge officially declared that Mexicana commence the insolvency process because, according to the investigator's report, Mexicana defaulted on its debt obligations with more than two creditors.<sup>106</sup> With this declaration, the conciliation stage of the process began.<sup>107</sup> According to the LCB, the Institute appoints a mediator to the case when the parties reach the conciliation stage.<sup>108</sup> But in Mexicana's case, the mediator was appointed by a Mexican government agency, the Communications and Transportation Ministry, because the Mexican federal government provided "public concessions" to Mexicana.<sup>109</sup> The Ministry appointed a mediator and administrator for Mexicana.<sup>110</sup> The primary role of the administrator is to restructure the costs for the company.<sup>111</sup> In addition to the statutory duty of assisting the debtor and creditors in reaching an agreement, the mediator in this case also has the duty of supervising the administrator.<sup>112</sup>

A preliminary list of Mexicana's creditors includes more than 20,000 creditors.<sup>113</sup> This figure includes about 8,000 of the airline's employees.<sup>114</sup> In November 2010, while Mexicana's insolvency process was in the 185th day conciliation stage wherein the mediator assists the parties in reaching a restructuring agreement, the mediator reviewed a business plan prepared by PC Capital, a private equity group interested in purchasing Mexicana.<sup>115</sup> The mediator selected PC Capital's business plan as the most promising option to enable Mexicana to resume operations.<sup>116</sup> Mexico's Communications and Labor ministries supported the business plan.<sup>117</sup> Negotiations with PC Capital were so promising that Mexicana announced that it would resume operations in the beginning of 2011 with seven planes and then increase its fleet to forty planes by the

105. Jesus Ugarte, *Mexicana, Cerca del Concurso Mercantil* [*Mexicana, Approaches the Insolvency Process*], Sept. 3, 2010, <http://www.cnnexpansion.com/negocios/2010/09/03/mexicana-entra-a-concurso-proxima-semana>.

106. Juez Consuelo Soto del Juzgado Decimo, *supra* note 102.

107. *Id.*

108. Law of Commercial Bankruptcy (amended), art. 146.

109. Ugarte, *supra* note 105.

110. Jesus Ugarte, *SCT Nombra Administrador Para Mexicana* [*Communications and Transportation Ministry Appoints an Administrator for Mexicana*], Sept. 7, 2010, <http://www.cnnexpansion.com/negocios/2010/09/07/tenedora-k-deja-administracion-de-mexicana>.

111. *Id.*

112. *Id.*

113. Jesus Ugarte, *Mexicana Tiene Más de 20,000 Acreedores* [*Mexicana has more than 20,000 Creditors*], Oct. 29, 2010, <http://espanol.news.yahoo.com/s/29102010/79/n-business-mexicana-mas-20-000-acreedores.html>.

114. *Id.*

115. Cyntia Barrera Diaz, *Mexicana Airline's Relaunch Plans Flop Again*, REUTERS, Mar. 2, 2011, <http://www.reuters.com/article/2011/03/02/mexicana-idUSN0222856620110302>.

116. *Id.*

117. *Id.*

end of the year.<sup>118</sup> By February 2011, Mexican government officials announced that Mexicana made a restructuring agreement with PC Capital whereby PC Capital “acquired a controlling stake in the airline’s holding company.”<sup>119</sup> But on March 2, 2011, the Mexican government suspended the sale of Mexicana to PC Capital because PC Capital did not have sufficient funds to purchase the airline.<sup>120</sup> Because the restructuring agreement failed, Mexicana continues to be in the conciliation stage of the insolvency process where it has until the end of March 2011 to reach an agreement with its creditors.<sup>121</sup> But the LCB provides that the mediator may petition the court for a ninety-day extension.<sup>122</sup>

## V. THE STATUS OF MEXICANA’S INSOLVENCY PROCEEDINGS IN THE UNITED STATES

Concurrent with the petition in the Mexico City District Court on August 2, 2010, Mexicana filed a petition for bankruptcy protection in a New York Bankruptcy Court under Chapter 15 of the U.S. Bankruptcy Code.<sup>123</sup> One of the purposes of Chapter 15 is to “assist foreign representatives to protect assets located in the United States that belong to a foreign debtor that has commenced insolvency proceedings in a foreign jurisdiction.”<sup>124</sup> Mexicana’s foreign representative petitioned the court to recognize Mexicana’s insolvency proceeding commenced in Mexico as a “foreign ‘main’ proceeding” under Chapter 15 and to “provid[e] the protections and benefits identified in the Bankruptcy Code.”<sup>125</sup> The petition listed more than \$500 million in assets and \$1 billion in debt<sup>126</sup> and requested the court to grant injunctive relief by barring “U.S. creditors from seizing planes or canceling contracts.”<sup>127</sup> The court issued a tempo-

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118. Jenalia Moreno, *Mexicana Airlines Gets New Life from Investors*, HOUSTON CHRON., Feb. 10, 2011, <http://www.chron.com/disp/story.mpl/business/7422176.html>.

119. *Mexicana Relaunch Suspended by Mexican Government*, AOL, Mar. 3, 2011, <http://news.travel.aol.com/2011/03/03/mexicana-relaunch-suspended-by-mexican-government/>.

120. *Id.*

121. Notimex, *Analistas Recomiendan Vender la Marca Mexicana [Analysts Recommend Selling the Mexicana Brand]*, EL UNIVERSAL, Mar. 15, 2011, <http://www.eluniversal.com.mx/notas/751944.html>.

122. *Id.*

123. *Compañía Mexicana de Aviación Files for Insolvency Proceedings*, *supra* note 56.

124. *Petition for Recognition of Foreign Main Proceeding and Request for Chapter 15 Relief*, *In re: Compañía Mexicana de Aviación, S.A. de C.V.*, Page 8, (No. 10-14182) (citing 11 U.S.C. § 1501(b)) (on file with author).

125. *Id.*

126. Tiffany Kary, *Mexicana de Aviación Files for Bankruptcy in Mexico*, BLOOMBERG, Nov. 8, 2010, <http://www.bloomberg.com/news/2010-08-03/mexicana-files-for-bankruptcy-protection-says-flights-won-t-be-affected.html>.

127. Jonathan Levin & Crayton Harrison, *Mexicana Bankruptcy Filing Accepted By Mexico Judge After Planes Grounded*, BLOOMBERG, Sept. 7, 2010, <http://www.bloomberg.com/news/2010-09-07/mexico-judge-accepts-mexicana-airlines-bankruptcy-filing-formula-reports.html>.

rary restraining order to protect Mexicana's assets.<sup>128</sup> A consortium comprised of nine major U.S. airports petitioned the court for permission to cancel contracts with Mexicana for terminal space.<sup>129</sup> The temporary restraining order prohibited the consortium from taking legal action against Mexicana.<sup>130</sup> But on November 4, 2010, the court allowed the consortium to terminate its contracts with Mexicana.<sup>131</sup> On November 8, 2010, the court granted Mexicana's request for Chapter 15 bankruptcy protection from U.S. creditors.<sup>132</sup> This ruling stays collection actions by Mexicana's U.S. creditors, allows Mexicana's foreign representative to both operate Mexicana's business and to serve as its trustee, and grants other protections under the Code.<sup>133</sup>

## VI. PREDICTIONS ON WHETHER THE AIRLINE WILL BE BACK IN THE AIR

After filing for bankruptcy protection and suspending its operations, Mexicana remained optimistic that it would "secure the company's long-term viability" and thus resume operations.<sup>134</sup> But there has been debate among experts as to whether Mexicana will be able to fly again. Analysts from the UBS bank believe that Mexicana's suspension will be permanent.<sup>135</sup> Even though the suspension "initially curb[ed] air traffic and hurt airport operators," these issues were quickly addressed when other airlines offered their services to fill the void left by Mexicana.<sup>136</sup> Therefore, it can be inferred that it will not be necessary for Mexicana to resume operations.<sup>137</sup> On the other hand, Mexico's Communications and Transportation minister remained optimistic that the suspension would not be permanent because of continued discussions with investors interested in restructuring the airline.<sup>138</sup> Experts involved in the airline's restructuring process contemplated the possibility of the airline resuming operations with a reduced fleet.<sup>139</sup> An attorney and expert in Mexican

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128. See Carla Main, *Mexicana Leasing Companies Ask Under Seal to Lift Automatic Stay*, BLOOMBERG, Aug. 12, 2010, <http://www.bloomberg.com/news/2010-08-12/extended-stay-capmark-lyondell-toys-r-us-mcdermott-bankruptcy.html>.

129. *Juez Autoriza Salida de Mexicana en Nuevo Aeropuertos de EU* [Judge Authorizes Mexicana's Exit from Nine U.S. Airports], Nov. 4, 2010, <http://sdpnoticias.com/sdp/contenido/internacional/2010/11/04/28/1151773>.

130. *Id.*

131. *Id.*

132. Kary, *supra* note 126.

133. 11 U.S.C.A. § 1520 (West 2005).

134. Grupo Mexicana Suspends Flights Until Further Notice, *supra* note 38.

135. Jonathan Levin & Crayton Harrison, *Mexicana Grounding 'Should be Permanent' Following Bankruptcy, UBS Says*, BLOOMBERG, Aug. 30, 2010, <http://www.bloomberg.com/news/2010-08-30/mexicana-grounding-should-be-permanent-following-bankruptcy-ubs-ag-says.html>.

136. *Id.*; Redacción Infosel, *Reitera UBS Opinión de que Cese de Mexicana es Permanente* [UBS Reiterates that Mexicana's Suspension is Permanent], TERRA.COM, Oct. 8, 2010, [http://economia.terra.com.co/noticias/noticia.aspx?idNoticia=201010081756\\_TRM\\_79322059](http://economia.terra.com.co/noticias/noticia.aspx?idNoticia=201010081756_TRM_79322059).

137. See Levin & Harrison *supra* note 135; see also Infosel, *supra* note 136.

138. Levin & Harrison, *supra* note 135.

139. *Id.*

insolvency proceedings suggested that Mexicana has a good chance of resuming operations because the Mexican government is involved in its insolvency process.<sup>140</sup>

After the restructuring agreement between Mexicana and PC Capital was suspended, Mexicana remained optimistic that it would find a new investor and would be able to be back in the air by Easter.<sup>141</sup> The mediator in Mexicana's insolvency process said that Mexicana continues to negotiate with potential investors interested in providing the necessary capital for the airline to resume operations.<sup>142</sup> Mexicana's mediator recognized that the airline's entrance into the market will be more difficult because of rising fuel prices.<sup>143</sup> In expectation of getting back to business, Mexicana developed a business model that budgets for jet fuel prices at the current price.<sup>144</sup> So rising fuel prices may not completely hinder the airline's ability to operate. The business model also provides that the airline's fleet will consist of forty-six planes and that the airline will "rehire around forty percent of its original workforce, focus on domestic and U.S. routes, and require a startup investment of around \$250 million."<sup>145</sup> Mexicana does not plan to operate as a low-cost carrier.<sup>146</sup>

Other experts believe that Mexicana's restructuring approach is not sustainable. Currently Mexicana seeks investors to provide capital for the airline to continue to operate under its current management. According to experts, the more reasoned restructuring approach is for the airline to sell its business, specifically the Mexicana brand name, to another domestic or international airline.<sup>147</sup> An airline purchasing Mexicana could operate Mexicana as a low cost carrier or it could use the Mexicana brand name to service new routes.<sup>148</sup> In short, Mexicana would resume operations under the ownership and management of another airline.<sup>149</sup> Experts suggest that the sale of the Mexicana brand is the most viable solution because the Mexicana brand and its routes are the airline's most valuable assets and the acquisition of these assets could result in increased profits for the purchasing airline.<sup>150</sup> Three airlines that could be interested in purchasing the Mexicana brand and possibly operating it as a low cost carrier include Aeroméxico, Interjet, and Volaris.<sup>151</sup>

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140. *Id.*

141. Dow Jones Newswires, *Mexicana Airline Holds Out Hope for Return to Skies*, FOX BUSINESS, Mar. 8, 2011, <http://www.foxbusiness.com/industries/2011/03/08/mexicana-airline-holds-hope-return-skies/#ixzz1HSjZhZU4>.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See Notimex, *supra* note 121.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

## VII. CONCLUSION

At this point it is uncertain whether the airline will be back in the air. Currently the biggest hurdles for Mexicana are finding an investor with sufficient funds to purchase the airline and maintaining financial viability upon resuming operations. The most important issues that Mexicana should address to maintain financial viability are the following; First, rising jet fuel prices indicate that the airline's management should ensure that the airline has adequate funding to purchase fuel in the long term. Second, the acquisition of routes formerly serviced by Mexicana by competing airlines means that Mexicana should have a plan specifying how it will reacquire those routes.<sup>152</sup> Third, the cancellation of contracts for terminal space in major U.S. airports requires strategic efforts by Mexicana to renegotiate those contracts to ensure successful operations in the United States. Fourth, it should set wages for its pilots and flight attendants that are more in tune with the average paid in the airline industry. Fifth, to ensure that consumers will buy tickets, it should study how consumers view the airline after this crisis and develop its customer relations accordingly. It is more probable that Mexicana will be able to maintain financial viability in re-entering the market if it is purchased by another airline because the purchasing airline will be able to provide the logistical support to enable Mexicana to overcome its operational issues and will have the incentive to make Mexicana profitable.

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152. *Mexicana Airline Holds Out Hope for Return to Skies*, *supra* note 141.

# Updates



