

# Involuntary Chapter 11 Petitions Dismissed in TV Azteca Case

November 28, 2023

On November 20, 2023, the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) issued a ruling dismissing involuntary Chapter 11 petitions (the “Petitions”) filed by creditors (the “Petitioning Creditors”) against TV Azteca, S.A.B. de C.V., a Mexico-based producer and distributor of Spanish-language television content, and thirty-four of its subsidiaries (collectively, the “Alleged Debtors” or “TV Azteca”). The Petitioning Creditors filed the Petitions seeking repayment of outstanding debt on unsecured notes issued by TV Azteca (the “Notes”). Prior to filing the Petitions, TV Azteca had defaulted under the indenture agreement governing the Notes, and the Petitioning Creditors and TV Azteca were engaged in litigation in both the United States and Mexico, which suits remain pending. In light of the prepetition disputes regarding the value of the Notes-related claims, the Bankruptcy Court reasoned that such claims were subject to, at least in part, a bona fide dispute, mandating dismissal of the Petitions. This decision adds to the trend among bankruptcy courts of interpreting section 303(b)(1) broadly with respect to the provision on “bona fide disputes,” where courts will find that even a partial dispute on the value of a claim is sufficient to dismiss an involuntary Chapter 11 petition.

## I. Case Background

On March 20, 2023, certain holders (i.e., the Petitioning Creditors) of unsecured notes issued by TV Azteca pursuant to a 2017 Indenture Agreement (the “Indenture”), filed involuntary Chapter 11 petitions against TV

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Azteca and certain of its subsidiaries that are guarantors under the Indenture.<sup>1</sup> The Petitioning Creditors alleged that TV Azteca has made no interest payments on the notes since February 2021.<sup>2</sup> Thereafter, in May and August 2022, the trustee under the Indenture (the “Indenture Trustee”), on behalf of certain holders of the Notes, issued acceleration notices demanding immediate payment of more than \$494 million in principal, interest, and fees on the Notes.<sup>3</sup>

### A. US Litigation.

On August 26, 2022, the Indenture Trustee filed a notice of motion for summary judgment in lieu of a complaint seeking \$469,783,272 in compensatory damages against TV Azteca in New York state court<sup>4</sup> (later removed to the U.S. District Court for the Southern District of New York (the “District Court”)).<sup>5</sup> The Indenture Trustee sought the principal, acceleration premium, and unpaid interest due under the Indenture.<sup>6</sup> The motion for summary judgment argued that the missed interest payments constituted events of default under the Indenture, and that therefore TV Azteca should be required to pay the full amount owed on the Notes immediately, including a redemption premium for early payment of the Notes.<sup>7</sup> The parties briefed a motion to require the plaintiffs to file a complaint, as opposed to the originally-filed motion for summary judgment in state court.<sup>8</sup>

<sup>1</sup> Involuntary Petition Against a Non-Individual, *In re TV Azteca, S.A.B. de C.V.*, Case No. 23-10385 (LGB) (S.D.N.Y. Mar. 20, 2023), ECF No. 1 (as subsequently amended, “Involuntary Petition”).

<sup>2</sup> Statement of the Petitioning Creditors in Support of the Involuntary Chapter 11 Petitions Filed Against TV Azteca and Its Debtor Affiliates, *In re TV Azteca, S.A.B. de C.V.*, Case No. 23-10385 (LGB) (S.D.N.Y. Mar. 27, 2023), ECF No. 8 (“Statement of Petitioning Creditors”) at 3.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Notice of Motion for Summary Judgment in Lieu of Complaint, *The Bank of New York Mellon v. TV Azteca, S.A.B. de C.V. et al.*, Case No. 653101/2022 (Aug. 26, 2022), ECF No. 2 (“Motion for Summary Judgment”).

However, upon the filing of the Petitions, the District Court litigation was stayed and otherwise unresolved.<sup>9</sup>

### B. Mexican Litigation.

While the litigation was progressing in the United States, on September 22, 2022, TV Azteca filed a complaint in the Superior Court of Justice of Mexico City (the “Mexican Court”), seeking injunctive relief to prevent the holders of the Notes from enforcing any alleged obligation of TV Azteca to pay on the Notes, citing, among other things, the COVID-19 pandemic as a force majeure act that rendered performance impossible.<sup>10</sup> On September 27, 2023, the Mexican Court granted the injunctive relief, deeming the acceleration notices on the Notes ineffective until the World Health Organization declares the end of the COVID-19 pandemic.<sup>11</sup> The noteholders allege that they were never served with a copy of either the complaint or the injunction, and the Indenture Trustee was not served until February 21, 2023.<sup>12</sup>

## II. Involuntary Chapter 11 Petitions

On March 20, 2023 the Petitions were filed. Thereafter, on April 25, 2023, the Alleged Debtors moved to dismiss the involuntary petitions, alleging that TV Azteca cannot be restructured through a Chapter 11 proceeding.

### A. Alleged Debtors’ Motion to Dismiss

The Alleged Debtors argued that the Chapter 11 Petition should be dismissed on four grounds: 1)

<sup>5</sup> Decision & Order on Motion, *The Bank of New York Mellon v. TV Azteca, S.A.B. de C.V. et al.*, Case No. 653101/2022 (Nov. 17, 2022), ECF No. 28 (“Removal Order”).

<sup>6</sup> Motion for Summary Judgment.

<sup>7</sup> *Id.*

<sup>8</sup> *Bank of New York Mellon v. TV Azteca S.A.B. de C.V. et al.*, Case No. 22-cv-08164-PGG.

<sup>9</sup> *Id.*

<sup>10</sup> Statement of Petitioning Creditors.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

because a bankruptcy proceeding would be “both futile and wasteful” per section 305(a)(1) of the Bankruptcy Code because substantially all assets, liabilities, operations, creditors, and parties-in-interest resided in Mexico; 2) on *forum non conveniens* grounds; 3) because the claims were subject to a bona fide dispute; and 4) for cause under Section 1112(b) of the Bankruptcy Code, since the proceedings were brought in bad faith as part of a litigation strategy.<sup>13</sup> The Alleged Debtors asserted that any of these reasons was sufficient to dismiss the Involuntary Petition.<sup>14</sup>

### B. Creditors’ Opposition Motion

The Petitioning Creditors argued that TV Azteca utilized the protection of U.S. law in raising \$400 million through the Notes given that the Indenture is governed by U.S. law and that certain noteholders are from the United States, and therefore TV Azteca could not now avoid suit in the United States when it had elected to default on its obligations under such agreements.<sup>15</sup> They further cited to the Grupo Aeroméxico, S.A.B., de C.V. (“Aeroméxico”) chapter 11 proceedings as evidence that Mexican companies were able to restructure through U.S. law, without a parallel Mexican proceeding.<sup>16</sup> The Petitioning Creditors asserted that the Bankruptcy Court had jurisdiction over the Debtors’ assets, wherever located, under prevailing case law, and that a Mexican court would recognize the U.S. proceedings, to the extent necessary, under the Mexican analog to chapter 15 of the Bankruptcy Code.<sup>17</sup> In support of this contention, the Petitioning Creditors cited to several Mexican

companies (in addition to Aeroméxico) that have recently restructured in the United States, including, Satellites Mexicanos, S.A., Maxcom Telecomunicaciones, S.A.B. de C.V., and Grupo Posadas, S.A.B. de C.V.<sup>18</sup> The Petitioning Creditors argued that the only difference in this case was the Alleged Debtors’ unwillingness to undergo restructuring proceedings.<sup>19</sup> Aside from the allegation that Mexico would not recognize the proceedings, the Petitioning Creditors contended that no other factors favored abstention.<sup>20</sup>

### III. The Mediation Proceedings

Prior to deciding the Motion to Dismiss, the Bankruptcy Court approved a joint stipulation from the parties agreeing to mediation, in an attempt to resolve the Petitioning Creditors’ grievances. The parties agreed to mediation for sixty days, with TV Azteca paying the costs of the mediator.<sup>21</sup>

The mediation lasted a total of sixty-seven days, and concluded without a settlement agreement.<sup>22</sup> Key points of contention between the parties included the amount of upfront payment from the Alleged Debtors, and whether to structure the remainder of the payment in one tranche or two – the two tranche proposal would have given the Alleged Debtors additional time to pay back the noteholders, in light of their newly released financial projections, which were significantly lower.<sup>23</sup>

The Alleged Debtors stated in a public press release that it continued to believe a consensual restructuring of the Notes was the best path forward.<sup>24</sup> In light of

<sup>13</sup> Memorandum of Law in Support of Alleged Debtors Motion to Dismiss, *In re TV Azteca, S.A.B. de C.V.*, Case No. 22-cv-08164-PGG (Apr. 25, 2023), ECF No. 26 (“Motion to Dismiss”).

<sup>14</sup> *Id.*

<sup>15</sup> Petitioning Creditors Opposition to Alleged Debtors’ Motion to Dismiss, *In re TV Azteca, S.A.B. de C.V.*, Case No. 22-cv-08164-PGG (June 16, 2023), ECF No. 34 (“Opposition”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 20.

<sup>19</sup> *Id.* at 20-21.

<sup>20</sup> *Id.* at 25.

<sup>21</sup> So-Ordered Joint Stipulation and Order, *In re TV Azteca, S.A.B. de C.V.*, Case No. 22-cv-08164-PGG, ECF 72 (Sept. 7, 2023).

<sup>22</sup> Letter re: Conclusion of Mediation, *In re TV Azteca, S.A.B. de C.V.*, Case No. 22-cv-08164-PGG, ECF 79 (Nov. 14, 2023).

<sup>23</sup> *Id.* at Ex. B.

<sup>24</sup> *Id.* at Ex. A.

the failure of the parties to come to a resolution, however, the Bankruptcy Court ruled on the motion to dismiss.

#### IV. The Bankruptcy Court’s Decision

On November 20, 2023, the Court issued a decision on the motion to dismiss, ruling that the Petitions should be dismissed because the claims were subject to a bona fide dispute.<sup>25</sup> Section 303(b)(1) of the Bankruptcy Code provides that an involuntary case may be commenced “by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability *or the subject of a bona fide dispute* as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$18,600 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.”<sup>26</sup>

The Court reasoned that despite the fact that a portion of the Petitioning Creditors’ claims are undisputed, namely, the principal amount plus two and a half years of unpaid interest, the pending litigation in District Court over the total amount, including fees and premiums, owed on the Notes demonstrated that there was clearly a dispute as to at least a portion of the claim.<sup>27</sup> The Bankruptcy Court noted that, although the Second Circuit Court of Appeals (the “Second Circuit”) has not ruled as to whether a dispute over part of a claim constitutes a “bona fide dispute,” other circuit courts have held that a partial dispute satisfies the “bona fide dispute” test, and the “vast majority of decisions by courts within the Second Circuit have followed this approach.”<sup>28</sup> Further, the Court noted that a creditor may not concede that a debt is

undisputed for the sole purpose of bringing an involuntary petition under Section 303(b)(1).<sup>29</sup>

Given the existence of a bona fide dispute, the Bankruptcy Court dismissed the Petitions. In so doing the Bankruptcy Court explicitly did not reach any of the other grounds that the Alleged Debtors had argued as reasons for dismissal, including *forum non conveniens* in favor of Mexico, because it wanted to avoid hamstringing “another judge...in the future by ruling on the three remaining arguments as to why involuntary petitions should be dismissed.”<sup>30</sup>

#### Conclusion

The TV Azteca decision adds to an increasing line of case law interpreting the bona fide dispute provision of Bankruptcy Code section 303(b)(1) broadly.<sup>31</sup> Though the Second Circuit has yet to weigh in on the matter, the First, Fifth, and Ninth Circuits have previously held, in line with the TV Azteca decision, that the provision applies broadly, even when only a portion of the claim is disputed.<sup>32</sup>

Moving forward, this decision, and others like it, make it more challenging for creditors to bring involuntary Chapter 11 petitions where, although there has been a default, there is a dispute as to the amount outstanding. This is particularly true if the dispute is already subject to ongoing litigation. In the future, creditors may wish to consider weighing the costs and benefits of disputing the amount owed under a default against the ability to bring an involuntary Chapter 11.

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CLEARY GOTTlieb

<sup>25</sup> Written Opinion Signed On 11/20/2023. Re: Decision Granting Alleged Debtors Motion To Dismiss The Involuntary Petitions, *In re TV Azteca, S.A.B. de C.V.*, Case No. 22-cv-08164-PGG, ECF 81 (Nov. 20, 2023) (“Opinion”).

<sup>26</sup> *Id.* at 10 (emphasis added); 11 U.S.C. § 303 (2023) (emphasis added).

<sup>27</sup> Opinion at 12.

<sup>28</sup> *Id.* at 14.

<sup>29</sup> *Id.* at 13.

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.*; 11 U.S.C. § 303 (2023).

<sup>32</sup> Opinion at 14.