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Global Bonds, Local Impact: International Bondholders Participation in Mexican Insolvency Processes

By Francisco Javier Garibay Guemez and Leah Eisenberg*

In this article, the authors examine the critical role international bondholders play in the restructuring efforts of Mexican insolvent companies. They specifically explore the issuance of international bonds under Rule 144A and Regulation S of the U.S. Securities Act of 1933 and evaluate their effects on the restructuring processes governed by the Mexican Insolvency Law (Ley de Concursos Mercantiles). By delving into the nuances of cross-border financial instruments, this article argues for legal reforms that are equipped to address the multifaceted challenges presented by international financial transactions. This analysis aims to serve as a brief foundational guide for understanding common issues in the restructuring processes of Mexican companies issuing international bonds which are often governed under non-Mexican law, particularly those subject to commercial bankruptcy proceedings in Mexico (Concurso).

I. INTRODUCTION

Over the last decade, the Mexican financial and bankruptcy landscape has undergone significant changes. International bondholders have assumed an increasingly pivotal role in the restructuring of Mexican companies facing insolvency processes. This evolution not only reflects changes in market dynamics but also underscores the increasing complexity and sophistication of global financial instruments, including the application of foreign law. The introduction of these complex financial instruments, along with the trend towards the internationalization of investment portfolios, has necessitated a novel approach in managing insolvency processes. This approach demands a reevaluation of our legal framework, as well as restructuring mechanisms, to effectively address the complex nature of financial commitments of Mexican companies and the interests of the various creditors involved.

A notable example of the growing influence of international bondholders was demonstrated in the bankruptcy process of UNIFIN Credit, S.A. de C.V.

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SOFOM, E.N.R. (UNIFIN), which concluded in February of this year, following the approval of the reorganization plan by the majority of its recognized creditors, including international bondholders. However, despite the success of this restructuring, it is essential to note that the Mexican Insolvency Law does not fully provide the mechanisms required by the current financial landscape for all companies to achieve successful restructuring.

Therefore, the purpose of this article is to conduct a brief analysis of the main characteristics of international bonds issued by Mexican companies and their impact on restructuring processes under the Mexican Insolvency Law. This analysis will serve as a foundational guide on some of the most common issues in the restructuring processes of Mexican companies that issue such international bonds (typically in the United States) that are governed by U.S. law, and which are then subject to a commercial bankruptcy process in Mexico (Concurso).

A number of Mexican companies, including PEMEX and CFE, as well as the major Mexican banks, have successfully issued international bonds. This group includes well-known names such as FEMSA, America Movil, CEMEX, Coca-Cola FEMSA, Grupo Televisa, Grupo Bimbo, and many others spanning diverse sectors such as telecommunications, construction, food and beverages, energy, mining, and financial services.[1] The move to diversify financing sources by issuing debt in various currencies and jurisdictions, with a primary focus on the United States, reflects international investors' confidence in the Mexican market and also showcases the strength and dynamism of the Mexican corporate sector on a global scale. The significant influence that international bondholders are likely to assert in future Mexican insolvency proceedings underscores the crucial role that international investors play in shaping the financial landscape. As major creditors to some of Mexico's largest companies across diverse industries, international bondholders will likely play a pivotal role in the outcomes of such proceedings.

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[1] A more detailed list of Mexican companies that have issued international bonds includes (among others) FEMSA, America Movil, CEMEX, Grupo Aeroportuario de la Ciudad de México, Braskem Idesa, Coca-Cola FEMSA, Sigma Alimentos, Grupo Televisa, Ciclo Combinado Tierra Mojada, Fresnillo, Becle, Infraestructura Energética Nova, Orbia Advance Corporation, Empresas ICA, TV Azteca, Cometa Energía, Industrias Peñoles, Alpek, Grupo Bimbo, Total Play Telecomunicaciones, Buffalo Energy Mexico Holdings, Unifin Financiera, Alfa, Kimberly-Clark de México, Nemak, Credito Real, El Puerto de Liverpool, Aeromexico, Alpha Holding, Controladora Mabe, Corporacion Inmobiliaria Vesta, Tangerine Pomelo Group, Financiera Independencia, Gruma, Grupo AXO, Grupo Famsa, Grupo Kaltex, and Grupo Posadas.

We hope this article will enable more Mexican insolvency lawyers to become familiar with the structure of international bonds and encourage dialogue to advance a more sophisticated bankruptcy practice. This necessarily involves thoroughly analyzing how to balance the rights of international bondholders (which rights are often set forth in U.S. indentures that are governed by U.S. law) with the need for efficient restructuring processes in the Mexican market, achieving the fundamental objective of the Mexican Insolvency Law: to preserve companies and to prevent the widespread default on payment obligations from jeopardizing a company's viability and the viability of the other companies with whom they maintain business relationships.

II. THE ISSUANCE OF BONDS BY MEXICAN COMPANIES IN THE UNITED STATES

In the context of financing options, Rule 144A of the U.S. Securities Act of 1933, as amended (the Securities Act) has become notably significant as a mechanism that enables Mexican companies to access international capital markets. Adopted by the Securities and Exchange Commission (SEC) in 1990, this rule provides a simplified procedure for the resale of securities, thereby enhancing the liquidity and attractiveness of private placements for both issuers and investors. Specifically, Rule 144A is designed to facilitate the resale of securities to qualified institutional buyers (QIBs), a category of investors characterized by their financial sophistication and their capacity to carry out significant transactions without the protections usually required for less experienced investors.

Rule 144A operates on the premise that transactions with QIBs necessitate less regulatory oversight, given these entities' sophistication and financial experience. By facilitating direct sales to these sophisticated investors, Rule 144A effectively eliminates various regulatory requirements and restrictions, thus promoting a more efficient and dynamic secondary market. This is especially beneficial for Mexican companies looking to attract capital from foreign institutional investors without the regulatory burdens of public securities offerings that must be registered with the SEC.

The process under Rule 144A includes an initial private placement of securities by the issuer to one or more investment banks or brokers, commonly known as initial purchasers. These entities then resell the securities to QIBs, acting in a role akin to underwriters in offerings registered with the SEC. This approach streamlines the distribution and marketing of securities to institutional investors, significantly enhancing the issuer's ability to secure capital on favorable terms.

Rule 144A has been particularly beneficial for Mexican companies, as it has enabled them to tap into international financing channels previously out of reach. By allowing these companies to interact directly with institutional investors in the United States and other countries, Rule 144A establishes a crucial link with the global financial ecosystem. This access is of great value for issuers seeking to diversify their investor base, mitigate local market volatility, and secure funds for expansion, innovation, or operational needs.

Additionally, Regulation S of the Securities Act outlines the parameters within which securities issued by these Mexican companies can be offered and sold outside the United States, without the need to be registered under Section 5 of the Securities Act. For a securities offer to qualify under Regulation S, it is necessary that (i) the offer be identified as a foreign transaction, and (ii) that no directed selling efforts are made within the United States.

Crafting a securities offer under the aforementioned Rules 144A/Reg S by Mexican companies represents an extraordinarily complex and multifaceted task, which is not the focus of this article. Among the various documents negotiated during this process, the indenture stands out as the most crucial for the purposes of this article, as it explicitly establishes the terms and conditions under which the securities issued by the Mexican company in question are offered. The main purpose of the indenture is to outline the obligations and rights of the issuer, the indenture trustee and the bondholders. Within its content, the process for the issuance of debt securities is outlined in the indenture, specifying the interest rate, payment dates, maturity date, and methods for making payments, as well as the procedures for transferring or exchanging the securities. Also, the obligations of the parties involved are defined, focusing mainly on the issuer of the securities. The indenture also serves as a protection mechanism for investors, detailing the issuer's obligations and commitments, including payment terms, interest rates, maturity dates and covenants.

Additionally, the indenture details the roles and responsibilities of the indenture trustee, who (i) prior to an event of default, monitors the governing bond documents, including monitoring the issuer's compliance of the documents, and performs basic nondiscretionary tasks as set forth the in the indenture, and (ii) after an event of default, has the right to enforce rights and remedies and otherwise manage the default process and safeguard the interests of bondholders, including initiating legal actions, coordinating debt restructuring efforts and overseeing the distribution of assets in the event of a bankruptcy proceeding. The standard of care for an indenture trustee once there is an event of default shifts to the prudent person standard, which, while not imposing fiduciary duties per se on the indenture trustee, requires that the

trustee act prudently under the specific circumstances. As provided above, the role of the indenture trustee is clearly described, potential default scenarios and their implications are enumerated, along with the legal actions that the trustee is empowered to exercise in such circumstances.

III. THE ROLE AND FUNCTION OF PRINCIPAL ENTITIES IN SECURITIES CLEARING AND SETTLEMENT

In the context of this analysis, which centers on the intricacies of Mexican bankruptcy law, it is crucial for practitioners specializing in insolvency to possess a basic understanding of the key organizations that facilitate the Clearing and Settlement of securities. This knowledge is vital not only for enhancing the reader's comprehension of the complexities detailed in subsequent sections of this article but also for shedding light on the nuanced dynamics of insolvency proceedings involving international bondholders. Such understanding is essential due to its direct relevance to insolvency proceedings involving international bondholders. Specifically, the focus lies on the Depository Trust Company (DTC) in the United States, along with Euroclear Bank SA/NV (Euroclear) and Clearstream Banking S.A. (Clearstream) in Europe. Each institution is indispensable to the financial markets' infrastructure, playing a critical role in ensuring the efficient and reliable clearing and settlement of securities transactions. Their operations are fundamental to the seamless exchange of financial assets, thereby ensuring the overall health and stability of global markets.

a. The Role of DTC in Securities Transactions

DTC is a central institution in the global financial markets, acting as one of the largest securities depositories in the world. As a subsidiary of The Depository Trust & Clearing Corporation (DTCC), DTC plays a fundamental role in the infrastructure that supports the trading and settlement of securities, enabling the streamlined transfer of ownership without the necessity for physical movement of securities.

Comparable to INDEVAL in Mexico, DTC facilitates securities transfers through a system of electronic bookkeeping entries, widely known as the "book-entry" system. In the case of debt securities issued by Mexican companies under the 144A/Reg S framework, the issuance of global notes is a common practice. These are registered in the name of Cede & Co., as nominee for DTC, while the indenture trustee for the issue typically serves as custodian for DTC, holding the physical global notes. This arrangement indicates that Cede & Co. is registered as the owner of the securities on the issuer's books, yet it effectively functions as an intermediary for the beneficial owners of the securities. These

owners, in turn, hold an interest in these securities through their accounts at financial institutions that are direct participants in DTC's system.

DTC's direct participants, comprising entities such as banks, brokers, and dealers, engage in the trading and settling of transactions in securities held in DTC's book-entry system. These transactions are executed through electronic book-entry transfers, reflected in the participants' accounts, thus eliminating the need for the physical transfer of certificates.

In the course of acquiring debt securities through the DTC system, direct participants are credited in DTC's records, ensuring the accurate updating of accounts. The purchaser's beneficial ownership interest is then recorded in the participant's books. However, DTC does not issue direct confirmations to the beneficial owners due to the lack of knowledge regarding their identities. Instead, it is the responsibility of DTC participants to acknowledge purchases and to document transfers for their customers—the beneficial owners.

b. Euroclear and Clearstream

In the European context, Euroclear and Clearstream stand out as the two principal clearing systems, providing comparable settlement services for securities transactions. Similar to DTC, they operate on an electronic book-entry transfer system, eliminating the necessity for physical certificates' movement and significantly improving efficiency and security in the settlement process.

Euroclear and Clearstream are indirect participants in DTC's system, with Citibank, N.A., and JPMorgan Chase Bank, N.A., respectively, serving as their U.S. depositaries with a direct relationship with DTC.

Both Euroclear and Clearstream enable transactions among their participants, who can access the systems either directly or indirectly through a custodial relationship. This accessibility ensures a broad and seamless network for securities transactions across Europe, enhancing the integration and liquidity of the European financial markets.

IV. Complexities in Out-Of-Court Restructurings

Successfully carrying out a restructuring outside of bankruptcy proceedings can be complex for Mexican companies that have issued bonds under the 144A/Reg S rules. The challenges in reaching agreements and contractual commitments among the various parties interested in the restructuring often increase when there are international bondholders, due to the following reasons:

a. Coordination Needs

The success of an out-of-court restructuring hinges on the creditors' capacity for a coordinated approach. This requirement stems from the interests of the various creditors of the insolvent company, each possessing different levels of involvement and expectations from the restructuring process. Focusing specifically on bondholders, restructuring bonds issued in the United States under the terms of Rule 144A typically encounters multiple obstacles, starting with the necessity for a specific number of bondholder approvals. For example, pursuant to most U.S. indentures, unanimity is often required to modify the fundamental payment terms of the bonds, a frequently unattainable threshold given the diverse interests and strategies of the various holders. Some holders may exhibit a much more litigation-prone attitude than others, which can further complicate the search for a consensual restructuring approach outside of a bankruptcy process.[2]

b. Information Quality

Another issue arises from the disparity in access to information between bondholders and other creditors (particularly bank lenders), which significantly influences the dynamics of any corporate restructuring and/or debt renegotiation. A key difference lies in the information rights granted to bondholders as compared to bank lenders. The documents regulating the bonds typically provide bondholders with limited rights to receive and request financial and other relevant information about the issuer. This limitation contrasts sharply with the rights enjoyed by bank creditors, who often have a full set of information rights. This imbalance not only affects the decision-making process but also alters the power dynamics between these two groups of creditors.

V. PARTICIPATION IN THE CONCURSO PROCESS

a. Recognition as Creditors

The recognition and classification of creditors within a Concurso process is a critical issue, especially in the context of bonds issued under global note

[2] The reason why some indentures often require unanimity to modify the fundamental payment terms of the bonds comes from the Trust Indenture Act 1939 (TIA). Although the TIA does not apply to bonds exempt from SEC registration, like those under rules 144A/Reg S, its provisions have become market standards. Issuers often incorporate these standards into indentures, even when not legally required, to ensure marketability. Deviating from these norms can hinder bond sales, demonstrating the TIA's broad influence on bond issuance practices.

structures. As previously explained, in such arrangements, securities are typically registered in the name of Cede & Co., as a nominee for DTC, which superficially positions Cede & Co. as the legal owner and, ostensibly, the creditor. However, this is a simplification that overlooks the reality that Cede & Co. serves merely as an intermediary for the actual beneficial owners of the securities, who are the genuine creditors of the insolvent issuer. This concentration of nominal ownership in a single entity exacerbates the challenge of mobilizing a majority for reorganization plan approval, due to the abstraction from the beneficial owners who are the true stakeholders in the outcome.

Considering the above, and in order to circumvent the limitations imposed by the traditional structures, the Mexican Insolvency Law was amended in 2014 in order to expressly permit the recognition of the underlying beneficial holders as creditors in respect of the obligations owed by the issuer on the global bond issuance, and to recognize their votes as creditors in respect of a restructuring of the issuer. This can be achieved either directly or indirectly. The indirect recognition of international bondholders as creditors of the issuer is facilitated through the indenture trustee, who can act as the common representative of the bondholders. This approach allows for the collective recognition of claims, simplifying the process and facilitating the representation of bondholders' interests in the Concurso process. For the direct recognition of their claims in the Concurso process, international bondholders have two alternatives:

1. *Direct Request for Recognition*: Bondholders can directly file a proof of claim, complying with the deadlines established in the Mexican Insolvency Law.
2. *Individualization of Their Claim* : After the recognition of the claim in favor of the indenture trustee, bondholders can request the individualization of their claim to be recognized directly as creditors of the issuer. In this case, the amount individually recognized to the bondholder in question will be deducted from the collective claim recognized in favor of the indenture trustee.

For direct recognition as creditors of the issuer, bondholders must submit a proof of claim to the bankruptcy conciliator. Such requests must be meticulously compiled, adhering to a set of clearly defined requirements set forth in the Mexican Insolvency Law. The request must encapsulate several core elements that constitute the basis for claim evaluation:

1. *Bondholder Identification*: The full name and address of the bondholder, ensuring the conciliator can readily verify the entity initiating the request.
2. *Claim Specifications*: The claim amount as estimated by the bond-

holder against the issuer.

3. *Claim Characteristics*: Detailed information about the bond issuance and the main terms governing the claim, including, if applicable, any collateral granted in favor of the bondholders.
4. *Ranking and Priority*: An analysis by the bondholder regarding the claim's ranking and priority.
5. *Related Proceedings*: If relevant, details of any judicial or arbitral legal proceedings ongoing against the issuer.

Furthermore, to substantiate their proof of claims, bondholders must gather all necessary documents that evidence their position as the beneficial owners of the bonds. In the context of bonds issued in the United States, this could imply that, among other things, the respective bondholder generally must:

1. Issue a certification, declaring to be the final beneficial owner of the bonds issued by the debtor;
2. Obtain a certification from DTC's direct participant (for example, Citibank, N.A. or JPMorgan Chase Bank, N.A.), certifying the amount and other characteristics of the bonds issued by the issuer, of which said bondholder is the beneficial owner;
3. Obtain authorization from Cede & Co., who, as previously mentioned, is the registered holder of the bonds, authorizing the bondholder, as the beneficial owner, to exercise all necessary rights to be recognized as a creditor in the Concurso process and to carry out all necessary actions to protect their investment within the Concurso process. For this, it is common for DTC's direct participant to deliver an instruction letter to DTC, requesting it to instruct Cede & Co. to grant such authorization; and
4. Grant the necessary powers of attorney in favor of their Mexican lawyers, who will represent their interests within the Concurso process. Typically, these powers of attorney, when granted abroad, must comply with the formalities established in international treaties signed by Mexico.

Furthermore, to aid the conciliator and the bankruptcy judge in analyzing and reviewing such documents, and to certify their authenticity, these documents are typically notarized in the United States, apostilled, and translated into Spanish by a certified translator for presentation and admission in the Concurso process.

Article 122 of the Mexican Insolvency Law stipulates the deadlines for creditors of the issuer, including international bondholders, to request the recognition of their claims. These deadlines are:

1. Within twenty calendar days following the publication of the Concurso judgment in the Federal Official Gazette. However, pursuant to Article 291-I of the Mexican Insolvency Law, foreign creditors could have up to 45 days to file a proof of claim with the conciliator.
2. Within a period of five days to formulate objections to the provisional list of creditors.
3. Within a period of nine days following the notification of the claim recognition, priority and ranking ruling (sentencia de reconocimiento, prelación y graduación de créditos) to file an appeal against it.

While these deadlines apply to the recognition of claims, it is questionable whether these deadlines are equally applicable to the individualization of claims by bondholders. In practice, bankruptcy judges often apply these deadlines to both the recognition and individualization of claims, which can create multiple practical problems, which are outside the scope of this article. For this reason, it would be convenient to amend the Mexican Insolvency Law to provide better regulation concerning the individualization of claims.

When bondholders choose to individualize their claim, it is beneficial for them to communicate this decision to the indenture trustee in a timely manner. This approach serves several important functions. First, it helps to clear up any possible misunderstandings, doubts, or discrepancies regarding the claim amount for which individualization is sought. It is common for U.S. indentures to provide the indenture trustee with the right to file a master proof of claim in any bankruptcy or insolvency proceeding, which claim represents the total amount of principal and interest owed under all of the bonds, including any fees and expenses incurred by the indenture trustee (which includes counsel fees) and in most cases an indenture trustee will submit such master proof of claim.

In addition, and as will be set forth below, U.S. indentures typically include language that (i) requires all distributions on account of the bonds to be made to the indenture trustee, who, in turn, will facilitate distributions in accordance with the indenture's payment waterfall provisions, and (ii) provides the indenture trustee with a "charging lien" against such distributions, which lien will apply all outstanding fees and expenses. By sharing their intentions with the indenture trustee, bondholders can collaborate and work with the trustee in navigating the process of claim individualization more smoothly, notwithstanding the submission by the indenture trustee of a master proof of claim. Such cooperation can make the procedure more streamlined, enhancing its efficiency and minimizing potential errors.

Moreover, failing to notify the indenture trustee promptly might introduce uncertainties about the exact amount of the claim being individualized by the

bondholders. While this situation could complicate the trustee's administrative tasks, it is worth noting that in an ideal scenario, such a lapse would not necessarily lead to disputes. Nonetheless, if the indenture trustee seeks to clarify the preliminary list of creditors or requests additional information from the bondholders, it could, in less ideal circumstances, raise the possibility of legal challenges. For example, there may be inconsistencies between the master proof of claim filed by the indenture trustee and the individualized claims, requiring complicated claim calculations and reconciliations. Thus, engaging in open and early dialogue with the indenture trustee, although not mandatory, is a prudent practice. It not only helps in mitigating legal risks and unnecessary, time consuming work, but also fosters a cooperative relationship between bondholders and trustees, ensuring a smoother individualization of claim.

b. Bondholders' Legal Ranking in the Bankruptcy Process

At the heart of the financial structure of any Mexican company lies various types of debt, each boasting its own level of priority and rights in the event of the company's insolvency. It is common for many Mexican issuers to accumulate a mix of bank debt (both secured and unsecured) and subsequently proceed to issue bonds. Generally, these bonds tend to be unsecured, meaning that in the event of a Concurso of the issuer, the bondholders are treated as unsecured creditors (acreedores comunes). However, the landscape is changing, and it has become increasingly common for Mexican companies to issue secured bonds (either with pledges or mortgages), which grant bondholders the status of secured creditors (acreedores garantizados) within the Concurso process, placing them on an equal footing with secured bank debt. In addition, if the secured bonds are issued under a U.S. indenture, more protective and remedial rights are granted to the indenture trustee upon an event of default.

c. Participation in the Approval of the Reorganization Plan

In exploring the intricacies of reorganization plans, it is important to acknowledge that the Mexican Insolvency Law delineates specific guidelines concerning the structural composition of restructuring plans. However, it simultaneously bestows upon the involved parties a significant degree of discretion in defining the economic essence of these plans. This dual approach underscores a balance between regulatory oversight and the flexibility necessary for tailoring solutions to the unique financial circumstances of distressed entities.

A reorganization plan must provide for:

(i) The payment regime for claims against the estate (acreedores contra la

masa), singularly privileged claims and tax claims;

(ii) The payment regime for claims of secured creditors and priority creditors who have not consented to the plan, with respect to their corresponding collateral or privilege;

(iii) The creation of sufficient reserves to pay the differences that could result from appealed claims and tax claims that are pending determination; and

(iv) An extension of term and/or a "haircut" (or discount) of claims for unsecured creditors that do not consent to the plan, which discount cannot be larger than that applicable to the group of unsecured creditors who did consent to the plan, which must represent at least thirty percent of all unsecured claims.

To become effective, a restructuring plan must be approved (i.e., signed) by the debtor (i.e., the issuer) and its recognized creditors representing more than fifty percent of the sum of: (i) the total recognized amount corresponding to unsecured and subordinated creditors (regardless of whether the holders of such claims have accepted the reorganization plan), plus (ii) the total recognized amount corresponding to secured or privileged creditors subscribing to the reorganization plan. The plan shall be deemed accepted by all those unsecured creditors whose claims are stated to be paid in full, subject to certain legal rules concerning quantification.

It is important to mention that under most U.S. indentures, the indenture trustee is expressly prohibited from voting to approve or reject any reorganization plan. Thus, while most U.S. indentures permits the indenture trustee to file a master proof of claim on behalf of all outstanding principal and interest under the bonds and to receive distributions on account of the bonds, it does not have the right to vote on any plan. The essence of this provision lies in ensuring the indenture trustee's independence and a recognition that the bondholders are the true financial stakeholders, a principle that is paramount for the protection of bondholders' interests. The rationale is clear: the trustee must navigate the complexities of its role without being swayed by external pressures or internal biases, thereby maintaining the integrity of its responsibilities to act in the best interests of all bondholders.

However, this restriction on the indenture trustee's actions presents practical challenges, particularly in cases where there is a large number of bondholders who have not individualized their claims, which could complicate the debtors' ability to help facilitate the opportunity of a collective participation of bondholders in approving a reorganization plan. It raises a complex dynamic where the indenture is structured to provide protections to bondholders'

interests yet might inadvertently hinder their collective voice in the reorganization process. Despite these challenges, there are various strategies that can be implemented so that bondholders can directly participate in the approval of a reorganization plan proposal, though the description and analysis of these strategies are beyond the scope of this article.

Generally, most indentures contain the rules for bondholders to adopt resolutions among themselves and to direct the indenture trustee to take (or not take) specific actions. Likewise, this document details both the obligations of the indenture trustee and the mechanisms through which it can receive instructions from the bondholders. However, in the event that the indenture does not regulate this, Article 161 Bis of the Mexican Insolvency Law establishes certain rules. In accordance with this provision, in the absence of specific rules in the legal documents regulating the issuance of the corresponding securities, the holders of collective claims against the issuing debtor may devise their own procedure to determine the mechanisms through which they will vote to approve the reorganization plan or, if necessary, adhere to the following rules:

1. *General Meeting of Bondholders*: Where the indenture is silent (typically not the case), the Mexican Insolvency Law mandates the indenture trustee to call a general meeting of bondholders upon learning of the existence of a reorganization plan proposal, so that within a period of fifteen days, the meeting takes place to discuss, an either approve or reject the proposal, or if applicable, exercise a veto against the already signed reorganization plan;
2. *Voting Thresholds and Publication*: For the purposes of approving or rejecting the proposal or, if applicable, exercising a veto against the already signed reorganization plan, it is required that at least seventy-five percent of the amount of the issuance be represented at the bondholders' meeting, and that the decisions be approved by at least a majority of the votes cast in the meeting.
3. *Role of the Indenture Trustee*: The indenture trustee will be the exclusive authority to communicate to the conciliator, the receiver (síndico), or the bankruptcy judge, the resolutions adopted at the bondholders' meeting and, if applicable, will proceed to sign the reorganization plan, thereby executing the resolutions and binding all the non-individualized bondholders with its signature;
4. *Provisions for Non-Meeting Scenarios*: In the event that a bondholders' meeting is not convened by the indenture trustee or that the necessary quorum is not met, any bondholder may participate in the Concurso

process to express its opinion regarding the proposal and, if applicable, to endorse it;

5. *Individual Actions by Bondholders*: Individual actions by bondholders will not be considered appropriate when the same objective is being pursued or is promoted by an action of the indenture trustee, or when such actions are incompatible with a resolution duly approved by the bondholders' meeting.

It is important to mention that unlike domestic bond issuances, U.S. indentures rarely provide for meetings of bondholders. Generally, both modifications to the terms of the indenture and instructions to the indenture trustee are usually carried out through (i) written consent/direction/instruction by the requisite ownership threshold (which can range from holders holding at least 25% to 50% of the aggregate principal amount of the outstanding bonds depending upon the specific consent/direction/instruction), and (ii) providing the indenture trustee appropriate indemnity.

In light of the foregoing, it is evident that the involvement of publicly traded bonds introduces an additional layer of complexity to gathering support for approving a reorganization plan. This complexity stems from a labyrinth of financial intermediation that obscures the identification and participation of beneficial owners in the decision-making process.

Unlike the structured voting mechanisms prevalent in Chapter 11 bankruptcy proceedings in the United States discussed below, which facilitate bondholder participation, in Mexico, there lacks a formal voting procedure wherein creditors cast ballots to accept or refuse the plan. The approval of a reorganization plan essentially revolves around negotiation and consensus-building among recognized creditors and the debtor, under the oversight of the bankruptcy conciliator. Once a consensus is attained, the ratification process is formalized not through voting but by the signing of the plan by the recognized creditors endorsing the reorganization plan. This significant distinction indicates that, unlike in the United States, beneficial owners do not receive ballots from record-holders.

After receiving approval of a reorganization plan from the debtor and the required number of creditors, the conciliator must then submit the reorganization plan to the bankruptcy judge for its own review and approval. Unsecured creditors are entitled to file objections or "veto" the reorganization plan for a set period of time. Following such period, the bankruptcy judge would then approve the reorganization plan if it finds that the proposed plan complies with all the statutory requirements and is not inconsistent with any public policy provision. The bankruptcy judge shall not assess the substance of the reorganization plan.

The reorganization plan, upon validation of the bankruptcy judge, becomes binding on:

(i) The debtor;

(ii) All unsecured creditors (regardless of whether or not they have endorsed the reorganization plan);

(iii) All signing secured and priority creditors; and

(iv) All secured and priority creditors whose claims are declared to be paid in full, subject to certain legal rules concerning quantification.

In contrast, the voting by creditors (which include bondholders) on a Chapter 11 plan is a critical component of the U.S. Chapter 11 confirmation process. For a Chapter 11 plan to be confirmed, it must either (i) be accepted by each class of impaired creditors, or (ii) satisfy the stringent "cram-down" standards under the U.S. Bankruptcy Code, which includes there must be a vote of at least one class of impaired creditors. To determine whether a class of creditors has voted in favor of a plan, U.S. bankruptcy law requires that a Chapter 11 plan be accepted by creditors (which include bondholders) that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors that voted to accepted or rejected such plan. As discussed above, beneficial owners of the bonds, and not the indenture trustee, have the right to vote on a plan and count as distinct votes for purposes of numerosity, notwithstanding the indenture trustee's right to file proofs of claim on behalf of bondholders and a broad grant of powers to enforce the rights of the creditors upon an event of default. Procedurally, a debtor that solicits support for its Chapter 11 plan in a U.S. bankruptcy proceeding will receive a list of the recordholders from DTC (i.e., the brokers, dealers, and banks), which, as discussed above, generally does not include the identity of the beneficial holders.

Thereafter:

(i) Debtor provides the recordholder with a master ballot and individual ballots to be distributed to the beneficial holders;

(ii) The record holder then distributes the individual ballots to the beneficial holders to vote on the plan;

(iii) The record holder then collects the individual ballots from the beneficial holders and summarizes the individual votes on the master ballot for submission to the debtor; and

(iv) A voting agent will review the master ballot and compare the votes cast with the record-holders' positions in the bonds according to the DTC's records.

d. Debt-for-Equity Swaps as the Preferred Restructuring Mechanism

Debt-for-equity swaps represent a process where creditors, including bondholders, agree to exchange their debt (including the bonds) and any other claims they have against the issuer for new shares of the issuer. This strategy, which can vary in complexity, is not limited to the exchange of debt for equity but can also include cash payments, the issuance of new debt instruments like convertible bonds or warrants, or a mix of these elements. The primary objective is to convert debt into equity, thereby relieving the insolvent company of its debt obligations and offering creditors the possibility of future gains through ownership of the capital stock of the issuer and, in many cases, control over the company.

Recently, several Mexican companies undergoing a Concurso process have opted for this route, with UNIFIN being the most recent case. Creditors, especially bondholders, are often motivated to approve reorganization plans involving these debt-to-equity swap mechanisms with the prospect of transforming their credit rights against the company into shares of the company's equity, which may increase in value once the company exits Concurso. These bondholders are frequently willing to assume the risk of owning equity in the issuer, betting on its recovery and the potential to achieve significant returns.

The decision to participate in a debt-for-equity swap is influenced by several factors, including the company's level of financial difficulties, the number and characteristics of secured creditors within the Concurso process, and the willingness of the company's shareholders to collaborate in the restructuring process. Bondholders, who generally hold unsecured debt, have the possibility of becoming significant shareholders, provided they can negotiate favorable conditions in the Concurso process.

The context of each restructuring will define the details of the exchange, such as the percentage of equity granted to bondholders after the restructuring, the amount of any cash payment, and the characteristics of the new debt instruments issued. These negotiations are key, as they establish the future relationship between the company and its new shareholders, with direct implications for the financial recovery and prosperity of both parties.

While this mechanism has been successfully used in recent cases like those of UNIFIN, and the construction companies GEO, Homex, and ICA, it is important to acknowledge that the implementation of this method is not without risks, both legal and constitutional.

The legal dispute originated from a misinterpretation of the Mexican Insolvency Law, particularly Articles 158 and 159, by the appeal court. This

confusion revolved around the question of whether creditors could be repaid with shares of the insolvent company's capital stock under a reorganization plan. The appeal court initially decreed that such repayment was not permissible without the approval of at least thirty percent of the unsecured creditors, as stipulated in Article 159 of the Mexican Insolvency Law. However, a higher court,[3] through an amparo trial,[4] clarified this ambiguity.[5] It determined that Article 159 applies solely to the details of reorganization plans involving the extension of payment terms, the reduction of debts (haircuts), or a combination thereof, provided that such plans are supported by no less than 30% of the consenting unsecured creditors. The court further elucidated that Article 159 does not cover debt repayment through an increase in the company's capital stock, as outlined in Article 155. Therefore, in the absence of specific regulation, a bankruptcy judge has the authority to authorize a reorganization plan that compensates creditors with shares in the insolvent company, even without the concurrence of thirty percent of the unsecured creditors, bypassing the conditions set forth in Article 159, which do not apply to debt-for-equity swaps.

However, the higher court's treatment of the possible Mexican Constitutional issues falls short.[6] Specifically, the court responded to mandatory affiliation

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[3] The Third Collegiate Court on civil matters of the First Circuit.

[4] An amparo trial is a type of legal proceeding in Mexico that protects citizens' rights by reviewing the constitutionality of a governmental action or law.

[5] Articles 158 and 159 of the Bankruptcy Law set forth the rules under which the debts held by the unsecured creditors must be determined and paid, which rules do not contemplate the conversion of debt to equity. The Bankruptcy Law provides that a restructuring plan may only be "crammed down" if it contemplates the payment of their unpaid obligations in one of the following three ways: (i) a term extension, with a capitalization of ordinary interest, with a maximum duration equal to the shortest term agreed to by the unsecured creditors that did execute the restructuring plan; (ii) a haircut of the principal balance and accrued unpaid interest, equal to the lesser amount agreed to by the unsecured creditors that have executed the restructuring plan; or (iii) a combination of haircut and term extension, provided the terms are identical to those accepted by at least 30% of the amount recognized for the unsecured creditors that executed the reorganization plan.

[6] The Collegiate Court's (Tribunal Colegiado) ruling on the Mexican Constitutional issues surrounding mandatory affiliation concerns was articulated as follows: "The issue is not about being compelled to be a shareholder of the insolvent company, but rather the possibility of recovery for the recognized creditors ranked as unsecured, through the opportunity to sell the shares in the market, once the respective debt-to-equity swap is carried out and the shares are formally issued. Given that the shares representing the capital stock are traded daily in the securities market, which entails that they are fungible and easily disposed of, which, according to the operation of the securities market and securities brokerage, ensures that the instant the creditors receive the relevant certificates, these can be traded in the market through their broker

concerns under Article 9 of the Mexican Constitution with weak arguments that reorganization plans with an agreement to exchange debt for equity do not impose mandatory circumstances on the affected creditors as such shares would be freely alienable and could be liquidated in market and applied towards repayment. However, not all Mexican companies are listed on the stock market (in fact, most are not) and market factors may not support an immediate transfer. Moreover, a creditor's ability to freely transfer the shares or membership interests of the insolvent company received in satisfaction of an outstanding debt obligation does not change the fact that, for an (indeterminate) period, the creditor is effectively forced to not only become the partner of the other creditors but also to become a member or a shareholder of the insolvent company.[7] Indeed, there is a risk that, if presented with the issue in question, the Supreme Court of Justice may be persuaded to declare such reorganization plans unconstitutional because they inappropriately bind the unsecured creditors that opposed the debt-to-equity swap strategy approved in the reorganization plan in violation of the principle of freedom of association provided in article 9 of the Mexican Constitution.

The Mexican Constitution, or at the very least, the Mexican Insolvency Law must therefore be amended to explicitly permit (i) the possibility of agreeing on the conversion of debt to equity as a form of payment to recognized creditors, and (ii) the possibility of agreeing to the sale terms for the disposal of a bankrupt company through the reorganization plan. Moreover, this amended legislation would benefit from a Supreme Court review to render the aforementioned tensions surrounding Constitutional issues silenced as the need to rescue companies and preserve employment is arguably of greater transcen-

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within seconds; therefore, it is incorrect to assert that an obligation is imposed on the creditor to remain as a shareholder of the company, or that this situation must persist during a mandatory and indefinite period, nor that specific restrictions have been imposed to prevent their free transfer. It is evident that the shares may be sold and each creditor may settle the amount that such certificates represent, receiving the relevant consideration. In this context, if the unsecured creditors accepted and executed the restructuring plan proposal, for their debts to be paid through the capitalization of shares that would be issued as a result of the increases to the capital stock of the insolvent company, then the dissident unsecured creditors have the option to accept this form of capitalization payment since those that consented did not accept any haircut, term extension, or combination thereof." See precedent I.3o.C 355 C (10ª), which is published in Weekly Federal Judicial Gazette, Tenth Period, Volume IV, August 2019, page 4516, titled: "Bankruptcy Procedure. The Principle of Democracy Governs in the Execution of the Related Restructuring Plan."

[7] See the jurisprudence on the subject matter: Commerce and Industry Chambers, Mandatory Affiliation. Article 5 of the Law on the Subject Violates the Liberty of Association Set Forth by Article 9 of the Constitution.

dental significance than the protection of an unfettered right of a minority of disgruntled unsecured creditors to freedom of association.

VI. CONCLUSION

The examination of Mexico's financial and insolvency landscape, particularly focusing on the impact of international bondholders, reveals the need to refine the country's legal framework. The critical influence of international bondholders on Mexican insolvency proceedings underscores the need for dialogue among legal professionals, regulators, and international investors to develop a more effective bankruptcy system in Mexico. This article contributes to the discourse on corporate restructuring, aiming to foster a collaborative effort to modernize the Mexican Insolvency Law. By highlighting these issues, it seeks to encourage a deeper understanding and cooperation among legal experts to adapt legal practices to global financial challenges. This ongoing discussion, enriched by the experiences of both international and domestic stakeholders, aims to evolve Mexico's legal landscape into one that is dynamic, resilient, and aligned with the global market.[8]

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[8] Other resources for this article include: (i) Sepulveda, E. (2011). Mexican Legal Framework of Business Insolvency (1st ed.). White & Case, and (ii) Zide, S.D., Shifer, J.A. & Sieck, B.S., 2022. Numerosity unwound: Counting votes on a Chapter 11 plan. Norton Journal of Bankruptcy Law and Practice, 31(1), pp.1-30.