The Argentine collective action clause controversy

Lee C. Buchheit and Mitu Gulati*

Key points

- Argentina is once again seeking to restructure its external debt. To facilitate this process, the country is proposing to use the state-of-the-art collective action clause that was included in the bonds Argentina started issuing in the Spring of 2016.
- When it uncloaked its restructuring offer in April of this year, however, Argentina sought the consent of bondholders to amend those clauses in ways that have sparked an outcry from certain of the holders.
- At stake in this controversy is the question of which version of a collective action clause will be incorporated in future bonds issued by sovereign borrowers.

Collective action clauses (CACs) are contractual provisions that permit a majority or supermajority of holders of a multi-creditor debt instrument such as a bond to make decisions that bind all holders of the instrument. Hailed as an innovative technique to facilitate sovereign debt restructurings in this century, CACs have become the object of a bitter controversy in the proposed 2020 restructuring of Argentine bond indebtedness.

1. Evolution of the clause

First Generation (FB Palmer)

Collective action clauses were first introduced in corporate bonds governed by English law in 1879. The English lawyer who claimed paternity for the clause, Francis Beaufort Palmer, was not bashful in describing its purpose. He wrote:

> The object of conferring this power on the majority is to protect it against unreasonable conduct on the part of the minority, and to prevent a deadlock happening when unanimity cannot be obtained. Unless the majority is thus enabled, in special circumstances, to determine what is to be done on behalf of the whole body, the minority is placed in a position to dictate to the majority, and the whole of the majority, however large, may be placed in peril by the stupidity, fraud, or greed of an insignificant minority . . . .[1]

These First Generation CACs normally permitted a specified supermajority of bondholders voting at a bondholders' meeting (in person or by proxy), to approve modifications to the terms of the instrument. If the required voting threshold (typically 75 per cent of the outstanding principal) was reached, the modification became binding on all holders, even

* Lee Buchheit is Visiting Professor of Law, Centre for Commercial Law Studies (London). Mitu Gulati is Professor of Law, Duke University.

1 Francis B Palmer, *Company Precedents 65*, Part I (6th edn, Steven and Sons (Limited) 1895).

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those that did not attend the meeting or voted against the resolution. 'Stupidity, fraud and greed' were thus to be vanquished by a simple contractual provision.

Although they became commonplace in bonds governed by English law in the late nineteenth and twentieth centuries, CACs were incorporated in only a small minority of corporate bonds governed by the laws of US jurisdictions.[2] Following enactment of the predecessor of Chapter 11 in the USA in 1934, the US Congress decided in 1939 to ban entirely the use of collective action clauses in corporate bonds issued to the public in the USA. If circumstances required such a bond to be restructured, Congress wanted the process to be conducted under the supervision of a bankruptcy judge.

Second Generation (G-10, 2002)

And there matters stood for the next 60 years. Several generations of American lawyers grew up with a vague sense that collective action clauses were contrary to public policy in the USA because Congress had forbidden their use in US corporate bonds. That misimpression was not dispelled until 2002 when, following the Argentine bond default of December 2001, the US Treasury Department exhumed the idea of using CACs as the principal tool to reduce the risk that maverick creditors could delay or derail sovereign bond restructurings. The rationale for Congress's prohibition on the use of CACs in corporate bonds did not extend to sovereign bonds for the simple reason that foreign sovereigns are not subject to the US Bankruptcy Code or any other insolvency regime.

At the urging of the USA, the G-10 countries commissioned a group of experts in 2002 to draft a model collective action clause suitable for use in sovereign bonds governed by New York law. That group—the G-10 Working Group on Contractual Clauses—produced its report in September 2002.[3] The model CAC contained in that report reflected a number of amendments to Francis Beaufort Palmer's nineteenth-century English law collective action clause. These modifications provided greater protections for minority bondholders and adapted the clause to procedures familiar to the US bond market. Six months after this Second Generation CAC was unveiled in the report of the G-10 Working Group, Mexico launched (in February 2003) a New York law bond with a Second Generation collective action clause.[4]

Third Generation (Uruguay 2003)

The weakness common to both First and Second Generation CACs is that those clauses operate only on a bond-by-bond basis. If the clause requires the affirmative vote of holders of 75 per cent of the outstanding principal of the bond, a determined holdout creditor or group of creditors who acquire 25 per cent of the issue can block the use of the clause for

2 The story is told in Lee C Buchheit and Mitu Gulati, 'Sovereign Bonds and the Collective Will' (2004) 51 Emory L J 1317. See also W Mark C Weidemaier and Mitu Gulati, 'A People's History of Collective Action Clauses' (2014) 54 Va J Int'l L 52, 71.

3 See Report of the G-10 Working Group on Collective Action Clauses (26 September 2002) <https://www.imf.org/external/np/g10/2002/cc.htm> accessed 15 August 2020.

4 The back story is detailed in Randal Quarles, 'Herding Cats: Collective Action Clauses in Sovereign Debt—The Genesis of the Project to Change Market Practice in 2001 Through 2003' (2010) 73 L & Contemp Prob 29; Anna Gelpern and Mitu Gulati, 'Public Symbol in Private Contract: A Case Study' (2006) 84 Wash U L Rev 1627.

that series. As noted in the G-10 Working Group report, however, this weakness could be remedied if the clause permitted the aggregation of votes over multiple series of a sovereign's bonds. It would be more difficult and more expensive for a holdout creditor to acquire a blocking position in the entire universe of a sovereign's bonds than in a single series. Four months after Mexico launched its bond with a Second Generation CAC in early 2003, Uruguay restructured its bond indebtedness (in May 2003) with the first *aggregated* collective action clause. In this Third Generation CAC, holders of different series of Uruguayan bonds could vote together as a single class.[5]

In drafting the first aggregated CAC, however, Uruguay confronted an obvious challenge—dubbed the *ganging up* problem. What is to keep holders of some series of bonds from using their combined voting power in the aggregated pool to force a disadvantageous deal on one or more other series? Example—assume 10 series of bonds, each linked with an aggregated collective action clause. The issuer proposes to restructure series 1 through 9 on very generous terms while forcing series 10, and only series 10, to write off 90 per cent of the principal of the bonds of that series. The many can thus gang up on the few by outvoting them.

Uruguay's solution to the ganging up problem was a *two-tier*, sometimes called a *two limb*, collective action clause. The Uruguay clause required an affirmative vote of the holders of 85 per cent of the outstanding principal of *all* series of affected bonds *and* a vote of $66^2/_3$ per cent of *each* affected series of bonds. The theory was that the need for a per series ratification would preclude the majority of holders from being able to disadvantage the minority. It was, however, a sub-optimal solution to the problem. While the *per series* voting threshold may have operated to prevent ganging up, it only perpetuated the weakness that had been identified in CACs requiring a bond-by-bond vote. In a First or Second Generation CAC, a holdout had to acquire 25 per cent of the issue to be sure of a blocking position. In a Uruguayan Third Generation CAC, that blocking threshold had been raised to 34 per cent. An improvement, but not much of an improvement.

The evolution of CACs has always been accretive. Uruguay's CAC, for example, also permitted changes to the payment terms of a bond through a conventional series-by-series vote (with a 75 per cent voting threshold). The clause gave the issuer the option of either pursuing its debt restructuring on a series-by-series basis or aggregating multiple series of bonds in a single voting pool (with a requirement that each affected series approve the modification as it applied to that series but at a per-series voting threshold of less than 75 per cent).

Fourth Generation (ICMA 2014)

Between 2003 and 2015, the market split. Many sovereign issuers included G-10 Second Generation, series-by-series, clauses in their international bonds, but a number of

5 See Lee C Buchheit and Jeremiah Pam, 'Uruguay's Innovations' (2004) 19 J Int'l Banking L & Reg 28; Anna Gelpern, 'How Collective Action is Changing Sovereign Debt' [May 2003] Int'l Fin L Rev 19.

countries (including Argentina and the Dominican Republic) opted for Uruguay-style Third Generation aggregated CACs.[6]

The Uruguay two-tier aggregated CAC also influenced the drafting of a model collective action clause for use in sovereign bonds issued by members of the European Monetary Union. That clause, which became mandatory for all eurozone sovereign bonds starting in 2013, allowed modifications to payment terms with an aggregated vote of holders of $66^2/_3$ per cent of the outstanding principal of all bonds in the aggregated voting pool *and* 50 per cent of the principal amount of *each* affected series. In other words, Uruguay-style two-tier voting with significantly lower voting thresholds for each tier.

The massive Greek debt restructuring of 2012 graphically demonstrated the weakness of CACs that required series-by-series approval of modifications. Greece had 36 series of bonds governed by English law, each containing a First Generation collective action clause. Greece convened a bondholder meeting for each of those series but only 17 series voted to join the debt restructuring. In the other 19 series holdout creditors had acquired blocking positions.[7] Even a Uruguay-style two-tier aggregated CAC may not have changed the result very much because the second tier still required per series ratification of the amendments.

In 2014, the US Treasury invited financial and legal experts representing sovereign issuers, investor institutions and official sector actors to prepare a new model Fourth Generation collective action clause.[8] It was billed as an *enhanced* aggregated collective action clause. The model clause resulting from this effort was promulgated by the International Capital Markets Association (ICMA) in August 2014.[9] The ICMA model permitted modifications to the important terms of a sovereign bond (the so-called Reserved Matters) in three possible ways:

(i) pursuant to a series-by-series vote (with a 75 per cent voting threshold),

(ii) on an aggregated basis by a two-tier vote *à la* Uruguay (but with a $66^2/_3$ per cent vote of the entire aggregated universe of bondholders and a 50 per cent vote of each series in the aggregated pool—similar to the model eurozone CAC), and

(iii) pursuant to a single, 75 per cent vote of the entire aggregated universe if, but only if, the proposed modification is Uniformly Applicable to all affected series.

6 See Michael Bradley and Mitu Gulati, 'Collective Action Clauses for the Eurozone' (2013) 18 Rev Fin 2045 (reporting data on the different types of CACs in the market as of 2012).

7 See Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, 'The Greek Restructuring: An Autopsy' (2013) 28 Econ Pol'y 513.

8 Multiple articles have been written about the creation of these CACs. These include, Mark Sobel, 'Strengthening Collective Action Clauses: Catalysing Change—the Back Story' (2016) 11 Cap Mkts L J 3; Antonia E Stolper and Sean Dougherty, 'How the Argentina Litigation Changed the Sovereign Debt Markets, Collective Action Clauses' (2017) 12 Cap Mkts L J 239; Anna Gelpern, Brad Setser and Ben Heller, 'Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds' in Martin Guzman, José Antonio Ocampo and Joseph E Stiglitz (eds), *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (Columbia University Press 2016).

9 See <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/collective-action-clauses/> accessed 15 August 2020.

The definition of Uniformly Applicable made it clear that all series had to be offered the same new instrument or other consideration or the ability to select from the same menu of new instruments. Option (iii) was the important innovation. It avoided altogether the need for a per series ratification of the proposed modification and thus the risk that a hold-out creditor could obtain a blocking position in one series. The ICMA model addressed the ganging up problem through the Uniformly Applicable requirement. If all series were being treated equally by the proposed modification, there was no possibility of a majority ganging up on a minority.

The ICMA model clause was clear in saying that the sovereign bond issuer had complete discretion to choose both the method for seeking bondholder approval (that is, options (i), (ii) or (iii) above) and, if an aggregated voting method were chosen (options (ii) or (iii)), which series of bonds were to be included in the aggregated voting pool. But—and this was a crucial *but*—once the issuer chose the modification method and the series to be aggregated for voting purposes, those decisions were final for the purposes of that offer. The relevant text of the ICMA clause intended for use in bonds governed by New York law reads as follows:

> The Issuer shall have the discretion to select a Modification Method for a proposed Reserve Matter Modification and to designate which Series of Debt Securities will be included in the aggregated voting for a proposed Cross-Series Modification; *provided*, *however*, that once the Issuer selects a Modification Method and designates the Series of Debt Securities that will be subject to a proposed Cross-Series Modification, those elections will be final for purposes of that vote or consent solicitation.[10]

Two features of the ICMA model CAC set the stage for the controversy that has recently overtaken the pending Argentine exchange offer. First, an ICMA two-tier aggregated vote requires the approval of holders of $66^2/_3$ per cent of the entire universe of aggregated bondholders *and* 50 per cent of *each* series of bonds included in the designated voting pool. Second, once the issuer has chosen which series of bonds to aggregate for voting purposes, that choice is final for purposes of that offer. In practical terms, these two features mean that if the issuer elects to aggregate series A, B, E, G, H and M for purposes of a two-tier vote and, when the votes are counted, series H fails to reach the 50 per cent voting threshold, the *entire* offer fails. We shall refer to this as the 'All or Nothing' feature of the ICMA aggregated two-tier voting option.

There were sound reasons for incorporating an All or Nothing feature in the ICMA New York model. The group of experts convened by the US Treasury to draft an enhanced aggregated CAC felt that bondholders were entitled to know—before voting—which other series of bonds were being included in an aggregated voting pool and, equally important, which series were being left out of the pool. In addition, once this information was communicated to bondholders, any changes to the composition of the voting pool could be

10 Curiously, this language did not appear in the ICMA model intended for use in bonds governed by English law even though the two models were supposed to be substantively identical. The different ICMA model clauses are available at <https://www.icmagroup.org/resources/Sovereign-Debt-Information/ > accessed 15 August 2020.

material to a bondholder's decision on how to vote. The ICMA clause thus gives the issuer complete discretion at the outset to designate which series of bonds will be aggregated for voting purposes. Once that decision has been made and communicated to bondholders, however, the designated composition of the voting pool(s) is treated as a material term of the offer, just like the proposed interest rate on the new bond, and cannot be altered without giving bondholders a fresh opportunity to reconsider their participation in the offer.

An illustration—if 10 series are proposed to be aggregated but the issuer subsequently decides to reduce this to only two series, a holder may conclude that the new bonds to be issued in the exchange will lack sufficient liquidity in the market. Or if the issuer subsequently decides to exclude a particular series because that series had failed to reach the 50 per cent per series voting threshold, other holders may legitimately want to know what treatment will be accorded to those excluded creditors and assess whether those holdout creditors could pose a litigation threat to the participating bondholders. When the ICMA model CAC was drafted in 2014, memories were still fresh that holdout creditors from Argentina's 2005 debt workout had successfully argued that the *pari passu* clause in their bonds entitled them to a court injunction forbidding Argentina from paying even the interest due to the holders who participated in the 2005 restructuring without first paying the holdouts (principal and interest) in full. The bondholder community had been given a painful lesson that holdouts could and would turn against their former bondholder colleagues if by doing so a preferential recovery could be extracted from the sovereign borrower.[11] The rationale of the All or Nothing requirement of the ICMA model clause was that if some of the issuer's bonds were excluded from the restructuring (or were to be treated separately), this was material information for the holders to know before their votes were counted.

In practice, the All or Nothing feature of the two-tier voting option in the ICMA model CAC meant that if an issuer wished to exclude from the aggregated voting pool one or more series of bonds after the offer was launched it would have to give all holders notice of this decision and either (i) give participating holders a period in which to withdraw their tenders if they felt the change was material to their decision to participate or (ii) relaunch the offer with the amended voting pool. A third alternative, and the one Argentina chose in its current offer, would be to seek the bondholders' consent to an amendment removing the All or Nothing feature of ICMA two-tier voting.

2. The Argentine controversy

Argentina launched its latest debt restructuring offer in April 2020.[12] As of the time of this writing the expiration date for the offer has been extended six times. Going into this latest

11 The story is told in Lee C Buchheit and Mitu Gulati, 'Restructuring Sovereign Debt After NML v. Argentina' (2017) 12 Cap Mkts L J 224.

12 See Benedict Mander and Colby Smith, 'Argentina Debt Restructuring Offer Leaves Investors Cold' *Financial Times* (17 April 2020) <https://www.ft.com/content/bb1000b3-966d-4b4c-95c7-a6a3aeddc749> accessed 15 August 2020.

debt restructuring Argentina had 12 series of bonds issued in 2005 and 2010 in connection with the country's last restructuring with a total principal amount of about $22 billion (the Exchange Bonds) and 17 series of bonds issued starting in the spring of 2016 during the administration of President Mauricio Macri with a total principal amount of roughly $40 billion (the 'Macri Bonds'). The Exchange Bonds contain Third Generation, two-tier CACs (with the high Uruguay voting thresholds of 85 per cent in aggregate and $66^2/_3$ per cent per series). The Macri Bonds, however, incorporate the Fourth Generation ICMA model collective action clause.

In the offer that it announced on 16 April 2020, Argentine proposed to restructure all 17 series of Macri Bonds using the two-tier voting option of the Fourth Generation ICMA clause.[13] For tactical reasons related to the economics of the deal, Argentina opted *not* to attempt the restructuring using ICMA's 'Uniformly Applicable' single voting option which would have avoided the need for a per series vote altogether.

Apparently worried that the 50 per cent per series voting threshold might not be reached for every one of the 17 series of Macri Bonds comprising the aggregated voting pool, however, Argentina requested the consent of the holders of the Macri Bonds to an amendment of the All or Nothing requirement of the ICMA two-tier voting mechanism. This has been nicknamed the 'Redesignation Amendment'.

Under the Redesignation Amendment, Argentina asked bondholder consent to permit Argentina, at its sole discretion, to change the series of bonds that had been identified at the outset of the process as constituting the aggregated voting pool for purposes of two-tier voting. That *redesignation* could occur even *after* the votes had been cast and counted. And because the designation of voting pools was not itself a 'Reserve Matter Modification' within the meaning of the Macri Bond CAC, Argentina took the position that the Redesignation Amendment could be approved with the consent of holders of only 50 per cent of the outstanding principal of each series (the Non-Reserve Matter voting threshold).

The proposed Redesignation Amendment sparked a sharp outcry from some of Argentina's bondholders. Argentina—a persistently undisciplined borrower[14]—was accused of looking for 'loopholes' that would dilute creditor rights.[15] One commentator even likened it to the far-fetched idea of a president invalidating votes after an election to ensure a satisfactory outcome for that president.[16]

Separate from the controversy over the Redesignation Amendment, but further aggravating the atmospherics surrounding Argentina's latest debt restructuring, is an issue that

13 See Scott Squires and others, 'Argentina Debt Offer Delays Most Principal Until the Next Decade' *Bloomberg* (17 April 2020) <https://www.bloomberg.com/news/articles/2020-04-18/argentina-debt-offer-delays-most-principal-until-next-decade?sref=wvo74VD0> accessed 15 August 2020.

14 See Anna Szymanski, 'Argentina Gets Too Cheeky With Its Creditors: CAC Handed' *Reuters Breaking Views* (8 June 2020), <https://www.breakingviews.com/considered-view/argentina-gets-too-cheeky-with-its-creditors/> accessed 15 August 2020.

15 See Colby Smith and Benedict Mander, 'Argentina Debt Restructuring Talks Close to Collapsing' *Financial Times* (18 June 2020) <https://www.ft.com/content/0ce01518-4b67-4a7d-b435-93386f7ea874> accessed 15 August 2020.

16 Szymanski (n 14).

has been given the rather lurid title of 'Pacman' (evoking one of the early computer games in which one character relentlessly gobbles up other images on the computer screen). Pacman refers to the possibility—prominently disclosed in the Argentine Prospectus related to the restructuring offer—that at any time after the current restructuring closes, Argentina may launch one or more subsequent exchange offers for Macri Bonds, including any series of bonds that declined to participate in the current restructuring, using the 'Uniformly Applicable' single-vote mechanism of the ICMA collective action clause. If holders of 75 per cent of the outstanding principal of all bonds included in such a subsequent transaction were given a Uniformly Applicable offer, it would eliminate any holdouts.[17]

An example—suppose Argentina closes the current restructuring with 16 out of the 17 series of Macri Bonds that form the current voting pool. Series 17 stays out. If the Redesignation Amendment becomes effective, this could be done without even forcing Argentina to relaunch the offer with a truncated voting pool.

Assume further that after the current offer closes, Argentina makes a new offer to all the holders of the new bonds it is about to issue (let's call them 'Fernández Bonds') *and* the holders of the Series 17 bonds that opted out of the current restructuring. That new offer could, for example, offer new instruments identical in all respects to the Fernández Bonds except for a 20 basis point increase in the coupon on Fernández Bonds. The ICMA model CAC would permit Argentina to include Series 17 in the voting pool together with Fernández Bonds. All holders of Fernández Bonds would logically accept this new offer. Why decline a 20 basis point pick-up in coupon? The combined voting power of the Fernández Bonds, however, will overwhelm Series 17. The result? Series 17 would blink out of existence.

The prospect of a Pacman strategy has inflamed the passions of some of Argentina's bondholders. The problem here is not the spectre of ganging up. Because Pacman would require the second offer to be Uniformly Applicable, Series 17 would have to be given the same instrument as the Fernández Bond holders, including that slightly sweeter coupon. The problem, the critics may argue, is voting integrity. The ICMA model CAC never contemplated—but certainly does not expressly preclude—the possibility of a two-tier vote restructuring followed quickly by a Uniformly Applicable restructuring of the same bonds.

The threat to the integrity of the voting process can be illustrated as follows. Suppose in our scenario above holders of only 70 per cent of the outstanding principal of *all* Macri Bonds voted in favour of the first restructuring; enough to meet the $66^2/_3$ per cent aggregated voting threshold in the ICMA two-tier clause. The *per series* vote for Series 17 (which, let us say, represented 8 per cent of the total pool) came in below 50 per cent and Series 17 thus stayed out of the first round restructuring.

In this example, the voices of the 30 per cent of the Macri Bonds who voted *against* the current restructuring would have been permanently silenced by the first two-tier vote even

17 Anna Szymanski, 'Argentina Drama Comes Down to Politics and Pac-Man: A Game of Inches' (22 June 2020) <https://www.breakingviews.com/considered-view/argentina-drama-comes-down-to-politics-and-pac-man/> accessed 15 August 2020.

though that 30 per cent would have been enough to block a single-tier Uniformly Applicable offer had such an offer been made in the first phase.

Now we come to the second phase. The Fernández Bonds (92 per cent of the total voting pool in this example) all vote in favour of the new, plus-20bp Uniformly Applicable offer, well above the 75 per cent needed to conclude a single-vote Uniformly Applicable offer. Series 17, with its 8 per cent voting power, rejects it. Result? All the bonds, including Series 17, are restructured. The second Pacman transaction thus accomplishes what the issuer could not have achieved—a total elimination of holdouts—using the ICMA model CAC in a single restructuring.

3. The proposed fixes

Confronted with an unanticipated use (or abuse, depending on your point of view) of the Fourth Generation ICMA CAC, some investors have suggested jettisoning that version of the clause altogether and reverting back to the Third Generation (Uruguay-style) or Second Generation (G-10 model) clauses.[18] Such a retrograde movement would, in our opinion, inflict significant damage and cost on the market for emerging market sovereign bonds. The overarching objectives of a collective action mechanism in a sovereign bond are (i) to ensure that any post-issuance modifications to the payment terms of a bond carry the broad support of the holders of the instrument and (ii) reduce the risks posed by any minority holdouts to the issuer of the bonds 'and' to the supermajority of holders who accepted the modifications. The willingness of the holdouts from Argentina's last restructuring to deploy a *pari passu* weapon on their quondam fellow bondholders illustrates that holdouts pose a potential threat to *all* of the other parties caught up in these affairs. On the other side of the scale, a healthy financial system must start with an assumption that contracts will be performed as they are written. Only extraordinary circumstances can excuse that performance and collective action clauses in sovereign bonds were *not* meant to give sovereign issuers the unilateral ability to change the terms of their bonds. The group of experts that drafted the model ICMA CAC, comprising individuals from both the debtor and creditor sides of the spectrum, attempted to strike this balance. Their handiwork has enjoyed overwhelming acceptance by the market and should not now be abandoned.

In a curious coincidence of timing, the first glimpse of proposed fixes to the redesignation and Pacman controversies has come in the pending restructuring of Ecuadorian, not Argentine, bonds.[19] Both countries have restructuring proposals in the market concurrently. With respect to redesignation, the terms for the Ecuadorian exchange offer

18 See Karin Strohecker and Cassandra Garrison, 'Stalled Argentina Debt Negotiations Ensnared by Pac-Man Fears and Legal Wrangle' Reuters (29 June 2020) <https://www.reuters.com/article/us-argentina-debt-legal/stalled-argentina-debt-negotiations-ensnared-by-pac-man-fears-and-legal-wrangles-idUSKBN2401RS> accessed 15 August 2020.

19 See Anna Szymanski, 'Ecuador is Willing Pawn in Argentina Debt Standoff: Taking One For the Team' *Reuters Breaking Views* (20 July 2020) <https://www.breakingviews.com/considered-view/ecuador-is-willing-pawn-in-argentina-debt-standoff/> accessed 15 August 2020.

(released 19 July 2020) allow the issuer to change the series of bonds included in an aggregated voting pool only if (i) the holders are given five business days to withdraw their votes or (ii) the results of the offer were approved by holders of more than $66^2/_3$ per cent of the principal of the originally designated pool. The apparent logic behind the second limb of this test is that if the supermajority of holders is prepared to permit a post-voting adjustment to the composition of the voting pool, they have decided that such a change to the voting pool is not material to their decision about whether to accept the offer. As far as we can see, the choice of $66^2/_3$ per cent for this minimum participation threshold is a matter for negotiation between the issuer and its supporting bondholders. Other deals could set the minimum participation threshold at a different number.

The Ecuadorian proposed fix to the Pacman issue is somewhat more complicated but follows the same logic that a supermajority of holders, as evidenced by their participation in the issuer's initial restructuring, can ratify or legitimize a second Pacman-style transaction to eliminate holdouts from the first round. Again, this is not a licence for ganging up on minority creditors to force them to accept a disadvantageous offer. A second Pacman transaction would need to satisfy the ICMA CAC's 'Uniformly Applicable' criterion. Essentially, everyone must get the same deal.

Ecuador has proposed that if in the first round restructuring holders of more than 75 per cent of the outstanding principal of all bonds included in that original offer accept the deal, the issuer will be free to launch a second, 'Uniformly Applicable', offer to close out minority holdouts from round one. The theory seems to be that such a 75 per cent vote would have allowed the issuer to conclude a single-tier Uniformly Applicable restructuring in round one so the effect on prospective holdouts would have been the same. Under the Ecuador formulation, if the issuer fails to reach a 75 per cent participation in round one, however, it must forbear for 36 months from using a Pacman technique to cram down any holdouts from that round one restructuring.

As of the date that this article is going to print (August 15, 2020), it appears that the negotiated "fixes" to the redesignation and Pacman controversies will be incorporated into the final terms of both the pending Ecuadorian and Argentine bond restructurings. The remaining issue—on which debate has already begun—is whether the form of the ICMA Fourth Generation CAC should now be amended to include this additional language. Doing so would presumably result in a Fifth Generation model clause bearing textual scar tissue from the redesignation and Pacman controversies of Argentina's 2020 bond restructuring.