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Beyond Formality: Rethinking the Treatment of Upstream and Cross-Stream Guaranties in Mexican Bankruptcy Law

By Francisco Javier Garibay Guemez*

In this article, the author analyzes the treatment of upstream, downstream, and cross-stream intra-group guaranties under Mexican insolvency law, highlighting doctrinal and practical deficiencies in their enforceability when the guarantor enters concurso mercantil. The author argues that the prevailing reliance on formal compliance and a rigid reading of Article 1837 of the Civil Code fails to account for the economic substance of such transactions, allowing structurally abusive guaranties to escape scrutiny. Drawing on comparative frameworks – such as the U.S. doctrines of "reasonably equivalent value" and "indirect benefit" – the author calls for doctrinal clarification, expansion of the avoidance regime under the Ley de Concursos Mercantiles, and enhanced institutional capacity to address the complexities of corporate group finance and protect creditor rights.

I. INTRODUCTION

In the evolving architecture of Mexican corporate groups, intra-group guaranties – particularly those structured as upstream or cross-stream obligations – have assumed a central role in both complex financing arrangements and post-facto insolvency disputes. While economically rational from the perspective of group-level credit optimization, such guaranties often provoke acute legal uncertainty when the guarantor becomes the subject of a concurso mercantil. Notwithstanding their prevalence in practice, Mexican law lacks a fully articulated doctrinal framework for their evaluation. The enforceability and vulnerability of these guaranties hinge, instead, on the intersection of two foundational yet conceptually underdeveloped legal regimes: Article 1837 of the Código Civil Federal (Federal Civil Code), which governs the classification of contracts as onerous or gratuitous, and Articles 112 through 119 of the Ley de Concursos Mercantiles (Insolvency Law), which establish the statutory grounds for avoiding transactions deemed fraudulent or preferential in the twilight period preceding insolvency.

Despite these provisions, Mexican courts and practitioners remain mired in interpretive ambiguity and excessive formalism, often privileging documentary

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appearance over economic substance. In this vacuum, structurally subordinated guaranties – especially those issued without demonstrable benefit to the guarantor – may escape effective scrutiny, even where they erode the guarantor's estate and compromise the pari passu principle.

This article seeks to reframe the legal analysis of intra-group guaranties within insolvency, offering a doctrinally rigorous and policy-conscious approach grounded in existing Mexican law but informed by comparative developments.

II. ONEROUSNESS, GRATUITOUSNESS, AND THE INSOLVENCY NEXUS

At the heart of the legal uncertainty surrounding intra-group guaranties under Mexican law lies the elusive distinction between onerous and gratuitous contracts – a classification that, while formally codified in Article 1837 of the Federal Civil Code, remains conceptually vague and functionally underdeveloped in its application to intercompany obligations executed within corporate groups. The doctrinal consequences of this distinction are anything but theoretical: they determine whether a transaction may be set aside in concurso mercantil proceedings, trigger irrebuttable presumptions of avoidable preference under the Insolvency Law, and ultimately define how risk and value are distributed among intra-group creditors and third-party lenders.

Article 1837 classifies a contract as onerous when it entails reciprocal provechos y gravámenes for both parties, and as gratuitous when only one party obtains a benefit without incurring a corresponding burden. The provision does not reference "consideration" in the common law sense – nor does it adopt a functional standard like "economic utility" or "value received." Instead, it adopts a formalist civil law vocabulary that focuses on whether mutual obligations are present within the four corners of the contract itself. As a result, Mexican courts often disregard indirect, non-liquid, or group-wide benefits, even when these would be deemed relevant (and sometimes sufficient) under Anglo-American insolvency doctrines such as "reasonably equivalent value" or the "indirect benefit" test.

This distinction has profound implications for the enforceability of intra-group guaranties. Downstream guaranties – those granted by a parent company in favor of its subsidiary's creditors – are typically presumed to entail some economic benefit in other jurisdictions. Courts in the United States and England, for example, recognize that a parent company may indirectly benefit from the enhanced solvency, operational continuity, or asset valuation of its subsidiary. However, under Article 1837, such benefits must be both concrete and legally cognizable to satisfy the test of onerosidad. Hypothetical advantages such as improved group creditworthiness or reputational spillovers may not

suffice. If the parent receives no demonstrable benefit in return, even a downstream guaranty may be vulnerable to reclassification as gratuitous – particularly when assessed in light of insolvency clawback provisions under Articles 114 and 117 of the Insolvency Law.

Upstream guaranties – by which a subsidiary guarantees the obligations of its parent company – are even more precarious. Since the subsidiary lacks a shareholder interest in the parent, the prospect of benefit is even more remote. Unless the guaranty is supported by clear evidence of a direct or contractual advantage – such as reimbursement rights, access to financing, or cross-collateralization for group benefit – it will likely be deemed gratuitous. The same logic applies, mutatis mutandis, to cross-stream guaranties between sister companies, which often lack both vertical control and reciprocal economic exchange.

This doctrinal rigidity is compounded by a judicial culture that privileges formal indicia – public deeds, shareholder approvals, board meeting minutes – over substantive economic analysis. Courts rarely interrogate whether the guarantor actually obtained value in exchange for the burden assumed. As a result, intra-group guaranties that may be economically rational and commercially ubiquitous – particularly in structured finance, syndicated lending, and project finance – are exposed to significant legal uncertainty when subjected to insolvency review.

The Insolvency Law further magnifies this uncertainty. Articles 114 and 115 create conclusive and rebuttable presumptions of fraudulent transfer for transactions that are gratuitous, executed at undervalue, or entered into with related parties during the 270-day retroactive period prior to the insolvency filing. Crucially, Article 114 treats gratuitous transactions as per se fraudulent, rendering them automatically voidable without the need to prove intent or actual harm to creditors. This irrebuttable presumption (fraude por ministerio de ley) leaves no room for business judgment, contextual justification, or evidence of good faith. Thus, once a guaranty falling within the retroactive period (periodo de retroacción) is characterized as gratuitous, its legal demise is nearly certain – regardless of the parties' commercial rationale.

Beyond clawback exposure, gratuitous guaranties also raise serious corporate governance concerns. Directors who approve such transactions may be exposed to liability for breach of fiduciary duties – particularly when the guaranty imposes a disproportionate financial burden on the guarantor, lacks internal economic justification, or is executed under pressure from a controlling shareholder. These risks are especially acute in distressed scenarios, where the guaranty is part of a coercive refinancing strategy designed to preserve the group's capital structure at the expense of the guarantor's insolvency estate. In

the case of publicly traded companies and their affiliates, such conduct may also constitute statutory disloyalty (deslealtad) under Article 35 of the Ley del Mercado de Valores, particularly where directors knowingly favor one shareholder or group of shareholders to the detriment of others. This provision imposes direct personal liability on directors who, without legitimate cause, procure economic benefits for particular shareholders – precisely the kind of intra-group favoritism that gratuitous guaranties often reflect. As such, the legal risks surrounding these transactions are not merely theoretical but implicate both civil clawback remedies and regulatory enforcement exposure.

In sum, while the binary classification between onerosidad and gratuidad appears formally clear, its application to intra-group guaranties reveals a significant doctrinal vacuum. Mexican courts lack a functional methodology for evaluating consideration in the context of corporate group dynamics. In the absence of a jurisprudential doctrine equivalent to "reasonably equivalent value," or even an interpretive standard for recognizing indirect benefit, the enforceability of intra-group guaranties remains hostage to evidentiary accidents and judicial discretion. Until a more economically grounded approach is either judicially developed or legislatively codified, the treatment of such guaranties in Mexican insolvency proceedings will continue to reflect a troubling gap between legal form and commercial substance.

III. FORMAL VALIDITY VERSUS ECONOMIC SUBSTANCE

The treatment of intra-group guaranties in Mexican insolvency proceedings continues to be shaped by a persistent – and deeply problematic – tension between formal validity and economic substance. In practice, Mexican courts have demonstrated a pronounced tendency to prioritize formal indicia of legality, such as notarized instruments, corporate approvals, and compliance with statutory formalities, over substantive inquiry into the real economic effects of the transaction on the guarantor's estate. This formalist approach, while administratively convenient, is doctrinally inadequate in the context of complex corporate groups, where financial interdependence and asymmetric control routinely obscure the true allocation of risk and benefit.

The shortcomings of this formalism are most evident in the context of upstream and cross-stream guaranties, where a solvent operating subsidiary assumes liabilities for obligations incurred by a parent or affiliate from which it derives no demonstrable economic gain. In such cases, the existence of board resolutions, intercompany agreements nominally reciting a benefit, or pro forma compliance with corporate governance procedures often masks what is, in substance, a gratuitous transfer of value that prejudices the subsidiary's own creditors. Yet in the absence of clear doctrinal standards or binding jurispru-

dence requiring courts to interrogate the economic substance of such arrangements, judicial review remains superficial and deferential.

This deference is particularly troubling when juxtaposed with the principle of realidad económica, a well-established interpretive tool in other areas of Mexican commercial law, including tax regulation. Courts applying this principle routinely recharacterize transactions that are simulated, sham, or economically incoherent. However, in the context of the Insolvency Law, the potential of realidad económica remains underutilized. While the statute does empower judges, conciliadores, and síndicos to challenge acts that operate as fraudulent transfers or concealed preferences, these tools are rarely deployed when the transaction in question bears the hallmarks of formal regularity. The result is a regime that permits economically irrational or coercive guaranties to persist unchallenged, effectively subordinating the interests of the guarantor's creditors to group-level imperatives.[1]

The consequences of this dynamic are not merely theoretical. Intra-group guaranties executed under pressure from controlling shareholders or as part of hastily structured refinancing packages often entail a stark transfer of financial risk from the parent or distressed affiliate to the solvent subsidiary, with no corresponding compensation or indemnity mechanism. These transactions are frequently orchestrated without meaningful board deliberation, independent oversight, or internal valuation. Directors of the guarantor entity – especially in closely held or vertically integrated groups – may lack the independence or incentives to resist such arrangements, exposing the company to liabilities that undermine its solvency and distort creditor expectations. In periods of financial distress, such guaranties become tools of last resort, executed under opaque conditions with little regard for long-term financial integrity.

If courts continue to uphold such guaranties solely on the basis of their formal execution, the protective aims of the Insolvency Law – particularly its

[1] A further layer of complexity arises when intra-group guaranties adopt the form of fianzas subject to sector-specific regulation. Under Article 34 of the Ley de Instituciones de Seguros y de Fianzas, the issuance of surety bonds (fianzas) by foreign companies to guarantee obligations incurred in Mexico is categorically prohibited – except in narrowly defined cases of reinsurance (reafianzamiento) or when accepted as counter-guarantees by authorized domestic institutions. Any fianza executed in contravention of this prohibition is deemed legally void and without effect. Although intra-group guaranties are often structured outside the formal insurance or surety industry, when their legal design mimics or substitutes a regulated fianza, they may be exposed to nullity on public policy grounds. This is especially relevant where foreign affiliates purport to guarantee Mexican obligations through instruments that could be recharacterized as unauthorized surety contracts. Mexican courts and insolvency professionals must therefore be attentive not only to the economic substance of such arrangements but also to their compliance with applicable regulatory constraints.

avoidance regime – are rendered illusory. Articles 112 to 119 of the Insolvency Law are designed to prevent the dissipation of estate value and the conferral of unjust advantages on insiders or related parties. But unless courts adopt a more substantive interpretive posture, these protections will remain largely aspirational.

To restore coherence and effectiveness to the insolvency framework, Mexican jurisprudence must evolve toward a functional methodology that privileges economic substance over procedural formalities. Doctrines such as the U.S. "collapsing" approach or the indirect benefit test applied to intercompany guaranties provide compelling analytical tools to distinguish legitimate group credit support from structurally abusive intra-group extractions.[2] While these foreign standards need not be adopted wholesale, they exemplify the kind of substantive scrutiny required to protect the integrity of the insolvency estate. Embracing such a methodology would not only align Mexican practice with international best standards but also give concrete effect to the constitutional mandate contained in Article 17, third paragraph, which requires that judicial authorities prioritize conflict resolution over procedural formalism – provided that due process, party equality, and other fundamental rights remain intact. In the context of complex group financing arrangements, fulfilling this constitutional imperative entails a deeper engagement with the economic realities underlying intra-group transactions, rather than mechanical validation based solely on form.

IV. TOWARD A COHERENT LEGAL FRAMEWORK

The fragmented and formalist treatment of intra-group guaranties under Mexican insolvency law exposes the urgent need for a more coherent, economically grounded, and institutionally credible legal framework. Although the Federal Civil Code and the Insolvency Law provide foundational tools for challenging gratuitous or prejudicial transactions, these provisions remain ill-suited to address the structural complexities and power asymmetries inherent in modern corporate groups. The widening gap between doctrinal formalism

[2] In U.S. fraudulent transfer jurisprudence, "collapsing" refers to the judicial treatment of a series of formally separate but economically interdependent transactions as a single integrated scheme, especially when the component steps are designed to achieve a unified end. Courts apply this doctrine when, for example, an upstream guaranty is issued by a target company in connection with a leveraged buyout (LBO), and the loan proceeds are diverted to selling shareholders rather than the guarantor. See Boyer v. Crown Stock Distrib., Inc., 587 F.3d 787, 795-96 (7th Cir. 2009); In re Mall at the Galaxy, Inc. (Bankr. D.N.J. 2022), aff'd, (3d Cir. 2024). The collapsing doctrine permits courts to disregard the formal separateness of transactions when all parties had knowledge of the overall structure and when the transactions are mutually dependent or conditioned on one another. Its purpose is to prevent circumvention of fraudulent transfer laws through strategic structuring.

and commercial reality – particularly in the assessment of provecho, the regulation of related-party transactions, and the safeguarding of creditor equality – renders the current regime normatively inconsistent and operationally ineffective.

At the doctrinal level, the concept of "benefit" (provecho) under Article 1837 of the Civil Code must be reinterpreted in light of the integrated nature of corporate group finance. The traditional binary between oneroso and gratuito contracts assumes an arm's-length exchange between legally and economically autonomous parties. That assumption breaks down in intra-group contexts, where benefits may be indirect, contingent, deferred, or shared across entities. Yet Mexican courts continue to apply Article 1837 without adjusting for these dynamics, resulting in a rigid jurisprudence that fails to capture the economic substance of intra-group guaranties. Absent a statutory or jurisprudential test for determining what constitutes a legally cognizable benefit in this context, courts are left without principled criteria for adjudicating disputes, and creditors are left without meaningful protection against intra-group opportunism.

A reformed framework must begin by developing a functional standard for evaluating economic reciprocity – one that parallels, though need not replicate, the "reasonably equivalent value" test employed in U.S. insolvency law. Under such a standard, the question would not be whether the guaranty recites formal consideration, but whether it results in real, measurable economic value to the guarantor commensurate with the burden assumed. This shift would empower courts to distinguish between legitimate credit support arrangements and disguised extractions of value, and would better align judicial analysis with the Insolvency Law's fundamental objective of preserving the insolvency estate for the benefit of all creditors.

Second, the categorical presumptions of fraud set forth in Article 114 of the Insolvency Law – though powerful in theory – are too narrowly drawn to capture the full spectrum of abusive intra-group conduct. The provision's focus on gratuitous acts and undervalue transactions omits structurally subordinated guaranties, coercive related-party arrangements, and other forms of group-level financial engineering that achieve the same effect: diverting value from the debtor's estate without reciprocal benefit. Expanding the scope of per se avoidable transactions to include guaranties issued without independent approval, without internal valuation, or in favor of related parties during the retroactive period would enhance both the preventive and remedial capacities of the insolvency regime.

Third, while the Insolvency Law does formally recognize the existence of corporate groups (grupos societarios) under Article 15, its treatment remains doctrinally incomplete and normatively insufficient. Although the statute

provides a basic definitional framework – identifying control and subordination relationships among related entities – it offers no substantive rules for regulating intra-group conduct, no mechanism for substantive consolidation of group estates, and no tailored fiduciary standards applicable to intercompany dealings in insolvency. The accumulation of group proceedings por cuerda separada (under separate docket), as mandated by Article 15, reinforces procedural fragmentation rather than promoting coordinated resolution. In practice, this regulatory lacuna enables controlling shareholders and parent entities to externalize risk through layered guaranties and capital structures, while shielding such conduct behind the formal separateness of legal entities. To address this systemic vulnerability, the Insolvency Law should be amended to incorporate targeted provisions – such as mandatory fairness reviews for intra-group transactions, enhanced disclosure of related-party guaranties, and independent director oversight – thus aligning Mexican insolvency law with the functional realities of group enterprise and contemporary standards of creditor protection.

Fourth, the institutional capacity of the judiciary and its auxiliaries must be substantially strengthened. Although commercial judges have formal jurisdiction over insolvency proceedings, many lack the financial literacy required to identify disguised preferences, analyze indirect benefits, or assess the commercial logic of multi-entity transactions. A modern insolvency regime requires more than legal interpretive skill – it demands fluency in financial structures, capital flows, and corporate governance dynamics. The specialization of bankruptcy courts, along with the professionalization and continuous training of visitadores, conciliadores, and síndicos, is therefore essential. These actors should be expressly empowered – and expected – to conduct substantive, transaction-level reviews of intra-group arrangements and to interrogate whether such transactions conform to the principles of good faith, economic rationality, and estate preservation.

In sum, the path to a coherent legal framework for intra-group guaranties entails both doctrinal realignment and institutional reform. Mexican law must move beyond surface-level formalities and engage directly with the economic substance and relational asymmetries that define corporate group structures. Without such a recalibration, the law will continue to tolerate the erosion of insolvency estates through superficially valid but economically destructive guaranties. By contrast, a functionally sound and institutionally robust framework would reaffirm the public interest character of insolvency proceedings, restore integrity to creditor protections, and harmonize Mexican practice with the evolving standards of global insolvency jurisprudence.

V. CONCLUSION

The treatment of intra-group guaranties in Mexican insolvency law exposes a doctrinal and institutional fault line – one that threatens the integrity of the insolvency estate, the predictability of creditor outcomes, and the legitimacy of the legal framework itself. While Articles 1837 of the Federal Civil Code and 112 to 119 of the Insolvency Law provide a formal structure for challenging gratuitous and fraudulent transactions, they remain analytically under-equipped to confront the realities of modern corporate finance. In the absence of a functional methodology for assessing whether a guaranty conferred real, reciprocal benefit on the guarantor, Mexican courts have defaulted to formalist reasoning that privileges appearances over substance. This has allowed economically abusive guaranties – especially those issued upstream or cross-stream without compensation – to persist, even when they erode the value of the estate and compromise the principle of pari passu treatment among creditors.

Nowhere is this doctrinal gap more visible than in the judicial treatment of structurally subordinated transactions. In many such cases, solvent affiliates are compelled to support distressed group entities without internal deliberation, without enforceable indemnification rights, and without any economic rationale grounded in the interests of the guarantor. The current framework, which often equates compliance with corporate formalities with substantive validity, permits these practices to go unchallenged. As a result, value is quietly reallocated within corporate groups, not through transparent negotiation, but through intra-group coercion disguised as group solidarity.

This systemic permissiveness stands in direct tension with the express objectives of the Mexican insolvency regime. Article 1 of the Insolvency Law frames the concurso mercantil not merely as a procedural device, but as an instrument of public policy – designed to preserve viable enterprises, mitigate systemic risk, and ensure the equitable protection of creditors against patrimonial dissipation. These objectives are to be pursued through adherence to foundational principles: good faith, procedural economy, transcendence, and transparency. Yet when intra-group guaranties are insulated from scrutiny simply because they comply with formal documentation requirements, these very principles are subverted. The erosion of the guarantor's estate becomes not only legally permissible but judicially endorsed.

To bring the law back into alignment with its normative commitments, reform is required on multiple fronts.

First, courts must adopt a functional approach to provecho under Article 1837 – one that focuses on the presence of real, measurable economic value.

Second, the Insolvency Law's avoidance regime must be expanded to presumptively capture intra-group guaranties that are coercive, structurally imbalanced, or executed without adequate safeguards.

Third, the institutional capacity of judges and insolvency professionals must be elevated to meet the financial and organizational complexity of modern group structures.

Comparative insights – particularly from U.S. jurisprudence – offer useful models for doctrinal evolution. While the principles of "reasonably equivalent value," "indirect benefit," and the "collapsing" of multi-step transactions are not transplantable in wholesale fashion, they provide conceptual frameworks that Mexican law can adapt to guide courts in distinguishing between legitimate group financing strategies and abusive intra-group extractions. These doctrines underscore a simple truth: that procedural compliance does not guarantee substantive fairness, and that group-level interests cannot be allowed to override the fiduciary and patrimonial boundaries that define legal personality and creditor rights.

Ultimately, the reform of Mexico's approach to intra-group guaranties is not merely a technical refinement. It is a necessary recalibration of legal doctrine to ensure that substance prevails over form, that fiduciary integrity constrains intra-group power, and that insolvency law fulfills its constitutional and statutory mandate to preserve value and deliver justice among creditors. Only by embracing this recalibration – through doctrine, adjudication, and legislative action – can Mexican insolvency law offer a credible response to the challenges posed by the architecture of corporate groups in the twenty-first century.