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WHAT IS INSIDE...

— INTRODUCTION —

by LFN Executive Director
Rafael Truan Blanco

It is almost one year since the pandemic enter our lives to stay for longer than we initially thought. The World Bank in its initial report dated April outlined what it is now a reality: "The COVID-19 pandemic has impacted firms by reducing demand for their products and services, disrupting the supply of inputs and tightening the provision of credit".

It already resulted in a shock to the financial system in the form of increases in non-performing loans, insolvency filings, unnecessary liquidations, and asset fire-sales. In the own words of the World Bank: Government responses so far have been a mix of regulatory forbearance, higher barriers to entry into formal insolvency proceedings and the extension of procedural deadlines. So far, the Governments response has been in the form of short-term measure mainly focus on preventing viable firms from prematurely being pushed into insolvency. The result in most of the countries has been the increase of what is called "zombie companies". Companies that while unable to cover debt servicing costs from current profits over an extended period, are now unable to resort to insolvency proceedings while its situation does not improve. The pandemic is adding a long list of companies to those already in existence.

According to the Financial Times (December 2020, Robin Wigglesworth) quoting the Bank for International Settlements, calculation of the share of zombie companies across the 14 big economies it studied had climbed from 2 per cent in the late 1980s to 12 per cent by 2016, companies neither recovering nor dying out.

The most likely reasons for this according to the FT and the BIS were the falls in interest rates that reduced debt repayments and banks being "reluctant to pull the plug". The recent pandemic measures adopted by Governments across the Glove do not help to reduce and endemic problem, quite the contrary. A mix of some lack of creative legislative capacity, not enough funding in the court system and an absence of long-term measures simply proroguing every six months or so, the short-term measures, are only rocketing the number of zombie companies in some jurisdictions.

At the LFN, the Insolvency and Restructuring Practice Group is closely monitoring legislation reforms and insolvency related measures aiming to complement the legislative changes by the publication of the Insolvency and Restructuring TRENDS magazine that you have in your computer now. This issue touches on legislations enacted in Denmark, Colombia, Ireland, Italy and The Netherlands as well as some UK case law. But the Group is also following up these changes in other formats. The LFN is launching "A Matter of Law" a series of podcast on a variety of legal issues affecting industry sectors, commencing with the retail sector, on of the most severely affected economy sectors by the pandemic. The Podcast "Boom or Bust in the retail sector – Covid perspectives from some of our European partners" will open the way to an analysis on the impact of Covid in the retail industry in different parts of the world.

Contact our Insolvency and Restructuring Practice Group co-chairs Monika Lorenzo-Perez in the UK and Peter Krarup in Denmark for more detailed information.

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THE DISTRIBUTION OF FUNDS RECOVERED FROM PONZI SCHEMES IN COLOMBIA

by **Jimena Marín**

Recovering procedures for Ponzi Schemes in Colombia are regulated by Decree 4334 of 2008 and are only governed by the bankruptcy law, Law No. 1116, in a subsidiary way.

This has led to this procedure, quite rightly having special characteristics. However, the distribution of recove-red money to net losers, that is, those who received more from the Ponzi Scheme than they invested, is inconvenient and unjust.

Colombia is a country of laws, where what predominates, in most cases, is the text of the law. For this reason, judges who fail to comply with the provisions of the law could be involved in criminal proceedings as well as disciplinary procedures that could lead to their dismissal.

Although Decree 4334 of 2008 is not a law in a strict sense, it is in a material sense, since it was dictated in the context of a state of economic emergency and therefore has force of law. In this sense, judges must comply with its provisions.

First paragraph of article 10 of Decree 4334 of 2008, specifically mentions that the distribution of money to net losers shall be made by dividing the existing money by the number of claimants, until the concurrence of their claim.

So, to give an example, if there are USD $10 million[1] to distribute, and there are 1,000 net losers, the judge will distribute USD $10,000 to each investor. This means that a person whose claim amounted to USD $1 million will receive the same amount of money as a person whose claim amounted to USD $1,000.

This has been the case in the latest relevant proceedings of recovery of Ponzi Schemes in Colombia. For example, in the last distribution made in the Estraval recovery case, a case famous because of the amount of the claims and the number of net losers involved, as 5,227 net losers presented their claims, who invested approximately a total od USD $200,000,000, approximately USD $3,000, per investor, regardless of the amount of their claim.[2] [3]

[1] To illustrate the examples, United States Dollars are used instead of Colombian Pesos.

[2] Liévano, "Y, Estraval qué?"

[3] Alvarado Ortiz, "Estraval Blogspot."

Colombia is a civil law country, in contrast to common law and, consequently, we do not have the notion of equity in our legal system. This, unlike the United States and other common law jurisdictions, where the trend of courts, based on equity, is to adopt a pro rata distribution of the money.[4]

In the United States, under pro rata distribution, the money available is distributed proportionally to the amount of the claim, allowing for greater fairness in distribution, since the higher the amount of the claim, the more money the claimant will receive.[5]

So, for example, if there are USD $10 million available to be distributed and 100 net losers, not all claimants will receive the same amount, but each one of them will receive an amount proportional to their accepted claim. Therefore, a person whose claim is USD $10,000 will receive less money than a person whose debt is USD $1 million, but both will receive the same percentage over their claim.

While some will argue that Colombia's distribution mechanism is more equitable, as it privileges those net losers who invested less money in the scheme and therefore have less purchasing capacity, I do not consider

[4] Sepinwall, "The Future of Restitution and Equity in the Distribution of Funds Recovered from Ponzi Schemes and Other Multi-Victim Frauds."

[5] 15 U.S.C. 78fff-2(b) United States Courts, "Securities Investor Protection Act (SIPA)."

this to be correct.

It can be true sometimes that an investor with a smaller claim has less purchasing capacity than an investor with a bigger claim. However, this is not always true, as it occurred countless times in the Estraval case, there are investors with less purchasing capacity, but who invested all their savings or pension money in the scheme invested more money in the scheme.

Then, in conclusion, Colombia must amend its Law on recovering procedures in Ponzi Schemes, to include a pro rata distribution of money, in order to adequately comply with article 13 of the Political Constitution that says that "All people are born free and equal before the law and will receive the same protection and treatment of the authorities and enjoy the same rights, freedoms and opportunities (...)." That is, in these cases, where the net losers are presumed to act in good faith, equality cannot be formal, but material, with equality for the unequal, as dictated by the ruling No. T-432 of 1992 of the Constitutional Court of Colombia.

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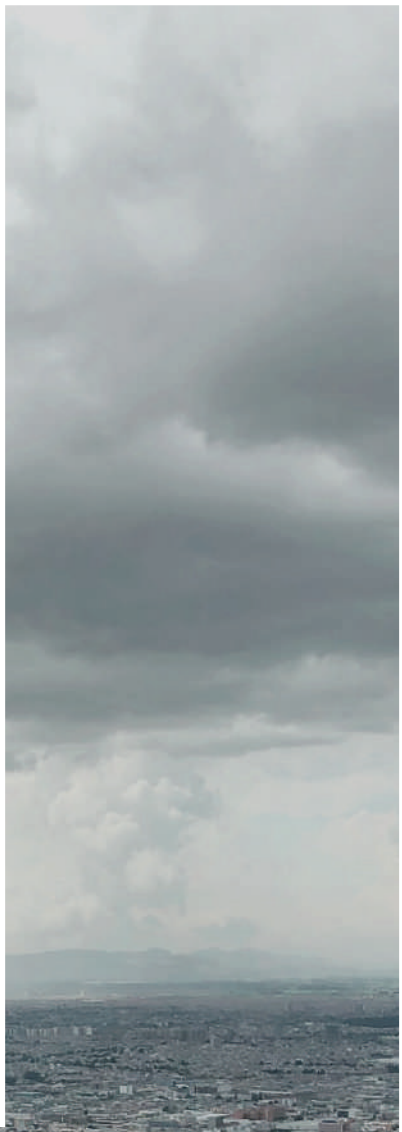

NEW BILL TO AMEND THE DANISH RULES ON RESTRUCTURING DUE TO COVID-19

by **Peter Wedel Ranch Krarup**

The Danish Government has submitted a bill that offers companies who are experiencing temporary financial difficulties an opportunity to carry on, rather than being declared bankrupt. The bill has yet to be passed but is expected to undergo final consideration and pass in the Danish Parliament on 9 March 2021.

The proposed rules are primarily due to the COVID-19 pandemic, but the proposed changes are not limited to the current COVID-19 situation. They will also cover companies that have run into financial difficulties for reasons other than COVID-19, just as the proposed rules will apply after the COVID-19 pandemic. The proposed rules are also due to a desire to simplify the restructuring process.

The main changes to the current restructuring rules are as follows:

- The appointment of a trusted accountant will no longer be mandatory.
- The restructurer may request to defer the adoption of the restructuring plan for up to four weeks without further justification.
- There is no longer a requirement for collateral for any subsequent bankruptcy proceedings.
- The company will not automatically be subjected to bankruptcy proceedings if the restructuring is not carried out.
- The possibility of completing a quick business transfer without the adoption and confirmation of a proposed restructuring.
- The buyer of a company that is undergoing restructuring only assumes employee obligations for the time after the restructuring has been initiated.
- The coverage from the Employees' Guarantee Fund in the event of restructuring is expanded.

No mandatory appointment of a trusted accountant

According to the current rules, once restructuring is initiated, a trusted accountant must be appointed. This often entails major costs in the initial phase of the process, as the trusted accountant must not be the company's own accountant.

According to the bill, a trusted accountant must only be appointed if the company itself requests it at the beginning of the restructuring, or if the restructurer or the creditors request it later on.

Deadline for adoption of a restructuring plan

According to the current rules, the restructurer and the trusted accountant may request to defer the discussion of the proposed restructuring plan at the four-week meeting in the bankruptcy court by up to four weeks, if special reasons call for it.

According to the bill, the four-week meeting must still be held, but the restructurer can now, without justification, request to defer the actual discussion of the proposal for a restructuring plan by up to four weeks. However, creditors can vote down such a deferral.

No collateral requirement for subsequent bankruptcy

According to the current rules, the commencement of restructuring proceedings is conditional on the requestor providing collateral for the costs of potential subsequent bankruptcy proceedings, the collateral for which typically amounted to around EUR 4,000-5,500.

According to the bill, this requirement will be abolished in order to reduce the

costs required to initiate restructuring.

No automatic bankruptcy in case of failed restructuring

According to the current rules, a company cannot withdraw from a restructuring unless either a restructuring is adopted which entails a compulsory composition and/or a business transfer, or the company becomes solvent. These rules therefore automatically led to the company being subjected to bankruptcy proceedings if the restructuring was unsuccessful, which has discouraged many companies from attempting a restructuring.

According to the bill, a company can, until a restructuring plan has been adopted (i.e. within the first 4-8 weeks), withdraw from an initiated restructuring, without it automatically subjecting the company to bankruptcy proceedings. This is expected to make more companies try to carry out a restructuring.

Possibility of quick business transfer

According to the current rules, a business transfer during restructuring proceedings may only take place in accordance with a restructuring proposal that has been approved by a majority of the creditors and upheld by the bankruptcy court.

The bill proposes that it should be possible to make a business transfer during a restructuring process according to a quick and simplified procedure, if it is deemed appropriate in order to preserve the value of the business. This only presupposes that the transfer takes place with the consent of the restructurer combined with the creditors' approval, but without the requirement for adoption and confirmation of a restructuring proposal.

Employee obligations in the event of a business transfer

According to the current rules, the buyer of a company that is undergoing a restructuring assumes all obligations towards the company's employees both for the time prior to and after initiation of the restructuring proceedings. This means that it is not possible to let the Employees' Guarantee Fund cover any wage claims, etc. prior to the restructuring proceedings or to transfer the activities from the company with a reduction in staff numbers, which is in contrast to the legal position in case of a bankruptcy, where the buyer is only liable for the employees' claims for the time after the bankruptcy has been initiated, just as it is possible to reduce the number of employees prior to a transfer.

The bill proposes that the buyer's legal position must remain the same, regardless of whether a business transfer is made during restructuring or bankruptcy proceedings. Thus, a buyer shall, in both cases, only be liable for claims relating to the time after the initiation of the restructuring or bankruptcy.

Coverage from the Employees' Guarantee Fund in the event of restructuring

It is also proposed that, in future, the Employees' Guarantee Fund must pay wage arrears, etc. already at the initiation of the company's restructuring proceedings in respect of claims from employees who have been terminated or released prior to or during the restructuring proceedings. Thus, they do not have to wait for a potential bankruptcy later on. Wage claims, etc. from employees who are still employed with the company after initiation of the restructuring proceedings, must still be borne by the company itself.

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CORPORATE RESCUE – THE EXAMINERSHIP PROCESS IN IRELAND

by **Sarah O'Toole**

With an increasing number of businesses across all sectors facing significant ongoing loss arising out of measures imposed in connection with COVID-19, insolvency will unfortunately be inevitable for some. Directors of insolvent companies are advised to take immediate steps to review any prospect of survival, and accordingly, consider the process of Examinership in this jurisdiction.

Examinership is the process whereby an insolvent company is placed in the protection of the Court to assist with its survival. Where a company is, or is likely to be, unable to pay its debts and no resolution has been passed or order made for the winding up of the company, a petition may be presented to the Circuit Court or the High Court to appoint an examiner. A petition for Examinership may be presented by:

- The company;
- The directors of the company;
- Any secured, unsecured, contingent or prospective creditor (including an employee); or
- Members representing 10% or more of paid-up capital of the company.

It should be noted that the Court will only make such an order if it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. Therefore, examinership should only be pursued if a practical view is taken that there is a reasonable prospect that a company can survive if the period of protection is applied by the Court.

What is the effect of Court Protection?

Where an order is made by the High Court to put a company into examinership, the company is placed in the Court's protection and for a period of 70 days from the date of the petition (which may be extended to a maximum of 100 days), the creditors of the company are prevented from taking any action to enforce any judgments or any security against the company. During this period, no winding up proceedings may be commenced, no receiver can be appointed, no attachment or execution against assets, nor any attempt to repossess goods under a hire purchase agreement will be allowed as against the company in question. Furthermore, no steps can be taken against any third party who has guaranteed the liabilities of the company.

Role of the Examiner

Once appointed, the role of the examiner is to examine the state of the company's affairs, consider the viability of the company and, if possible, prepare a proposal (a scheme of arrangement) for the company's financial survival.

Following the appointment of the examiner, the directors of the company remain responsible for the day to day management of the company which differs from liquidations or receiverships.

How is the Scheme of Arrangement dealt with?

The Scheme of Arrangement will be put to the shareholders and creditors for approval. The Scheme of Arrangement will be deemed to be accepted by the creditors if passed by a majority in

number and value of any class whose interests or claims would be impaired by the proposals.

Once voted on by the shareholders and creditors, the examiner must then report on the outcome to the Court. If the Scheme of Arrangement has not been accepted, the Court will usually bring the examinership to an end and a receiver or liquidator may be appointed.

If the Scheme of Arrangement has been accepted, a hearing date will be set for the court to consider it. Any creditor or member whose claim or interest would be impaired if the Scheme of Arrangement was confirmed, may appear and be heard at this hearing. The Court has a discretion to confirm the Scheme of Arrangement, confirm it subject to modifications or refuse to confirm it.

If the Court confirms the Scheme of Arrangement, it will then fix a date for the implementation of the Scheme, which will not be later than 21 days from the date of its approval. On the date of implementation, the role of the examiner ceases and the company is released from the Court's protection. The Scheme of Arrangement will then be binding on the company, its shareholders and creditors. This includes shareholders and creditors who may have not approved the Scheme of Arrangement. Measures which may be included in a Scheme of Arrangement include, the forced termination of onerous contracts or a requirement that a portion of the company's debt is written off.

Although the cost of the examinership process must be considered at the outset, examinership has proved to be a successful means of survival for many companies struggling financially given the advantages offered by court protection.

Norwegian Air

On 7 December 2020, the Irish High Court affirmed the appointment of an examiner to a number of the companies in the Norwegian Air Group together with the Oslo based parent company of the group, Norwegian Air Shuttle ASA. That examinership has been extended to 25 February 2021 and the Examiner is currently finalising a scheme of arrangement to deal with the group's debts which on his appointment stood at over €4 billion. The High Court will have to approve the scheme of arrangement and any creditors opposing the plan must demonstrate that they would fare better in a liquidation event in order to convince the Court to decline it.

Whilst the examinership process may not be appropriate for some companies where there is no prosect of survival, it is a process which proves very effective in ensuring the survival of certain companies which are struggling financially for any reason, including of course, the effect of restrictions brought about by the COVID-19 pandemic.

Examinership & EU Directive 2019/1023

The EU Directive 2019/1023 (Directive on restructuring and insolvency) ("the Directive") was put in place to harmonise Member State's approach to procedures concerning restructuring, insolvency and discharge of debt. The transposition period for Member States is 17 July 2021, by which time member states shall publish and adopt the necessary laws and provisions to comply with the Directive (there is a possible extension period of up to one year).

Ireland currently has a preventative restructuring framework in examinership, which complies with many of the requirements under the Directive and reflects many of the provisions within the Directive.

It is said that the Directive is the European equivalent to Chapter 11 of the US Bankruptcy Code which provides for reorganization in that jurisdiction. The principal objective of the Directive is to remove some of the existing barriers to the free flow in capital, which are partly caused by individual Member States' differing laws in relation to restructuring and insolvency.

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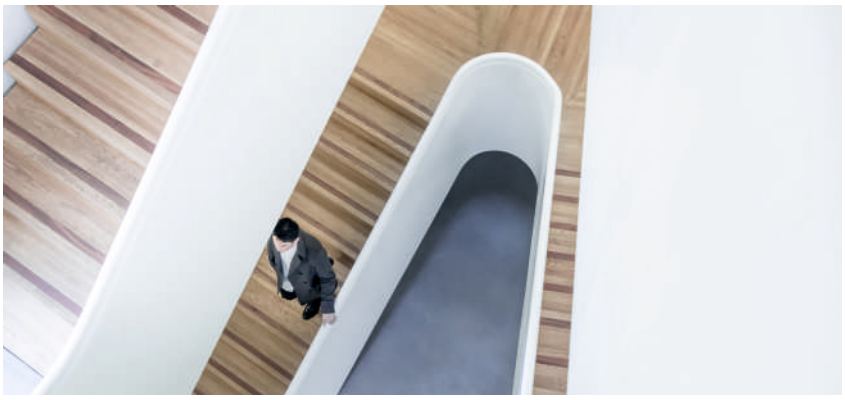

NEW ITALIAN BANKRUPTCY ACT: THE MAIN INNOVATIONS

by **Patrizio Cataldo**

On 1 September 2021 the New Italian Bankruptcy Act (Legislative Decree n. 14/2019) shall enter into force, replacing the current Bankruptcy Act, issued in 1942 and considered no longer effective to ensure a sufficient protection to the creditors and to the companies facing financial difficulties and/or insolvency. Indeed, one of the biggest issue related to the current Italian Bankruptcy Act is the fact that the crisis of the debtor arises too late and, therefore, one of the main aspect of the new law is its emphasis on a early intervention on this regard.

The law aims to achieve this result through a new out-of-Court proceeding and through a stronger involvement of the Statutory Auditors and directors in the management of the "financial red flags" of the crisis, with the purpose to timely intervene on it and safeguard the assets, the cash flow and the profitability of the company, to the benefit of the company itself and of the creditors.

In substance a new body, named Body for the assisted management of the crisis (Organismo di composizione assistita della crisi, OCRI) shall be constituted in each Chamber of Commerce.

The directors of the company are required to establish a corporate structure so that it is possible to promptly identify the crisis alerts and manage them. The Statutory Auditor are required to monitor the structure of the company and the crisis alerts and are obliged to notify such alerts to the directors. Should the directors not take any effective initiative, the Statutory Auditors shall send a notice to OCRI, which will call the directors of the company. The OCRI procedure can (should) be started directly by the directors, without the notice of the Statutory Auditors, as the latter are required to intervene only in a second and eventual stage.

Should the OCRI assess that the company is not suffering any crisis, the proceeding will be terminated. Otherwise, OCRI will suggest to the directors the measures to be taken to mitigate or avoid the crisis. Such measures could be an out-of-Court agreement with the creditors or similar solution to be identified on the basis of the single case.

All information provided by the company to OCRI shall remain private and confidential.

During the OCRI proceeding the directors may request the Court to freeze all enforcement procedures (if any) started against the company for a time no longer than 6 months, so that the assisted negotiation of the crisis can be properly pursued.

The OCRI proceeding can be started also as consequence of the initiative of other determined subjects, such as the Tax Authority in case the amount of the taxes not paid by the company should be higher of a specific amount.

Another significant amendment of the law is the new name of the main insolvency procedure: it is no longer named "bankruptcy" (fallimento) but it is now called "judicial liquidation" (liquidazione giudiziale), in order to reduce the negative imagine linked with it.

Currently the percentage of reimbursement of the non privileged credits in case of bankruptcy is equal in average to 10% and often such amount is around 1-2% of the original amount of the credit.

The Parliament hopes that the new regulation will help the company to identify the crisis as soon as possible, so that -if possible -the company restart its activity with an agreement with the creditors and -if not - the assets available to the judicial liquidator shall be enough to ensure to the creditors a payment much higher than the current one.

Only in the next years we will be able to understand if the New Insolvency Act shall have achieved the underlying purposes but it is clear that a reform of the current insolvency act was no longer postponable.

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NEW: DUTCH SCHEME

by **Peter Bos, Joost van der Grinten & Joram Verstoep**

The Act on the approval of a private composition for the prevention of bankruptcy (hereinafter: the 'Dutch Scheme') has entered into force on 1 January 2021. The Dutch Scheme offers companies, and parties that have an interest in those companies, the possibility to alleviate the debt burden of the company and/or to terminate unfavourable agreements prematurely within a very short period of time. This allows a debtor to conclude a composition, i.e., a voluntary arrangement with creditors and shareholders so that a suspension of payments and a bankruptcy can be prevented, and to petition the court to impose the composition on creditors and shareholders who have not agreed thereto. The Dutch Scheme offers a number of interesting options in the restructuring of debts to both creditors and companies in financial difficulty.

Objective of the Dutch Scheme

Previously, under Dutch insolvency law, creditors and shareholders could only be compelled to agree to a composition in the event of a suspension of payments or bankruptcy. Apart from that – with a few exceptions – it was

nearly impossible to impose a composition on creditors who did not consented thereto. This has an adverse effect on companies that, in principle, are still viable but have many debts. Because creditors and shareholders could easily prevent the conclusion of a composition, they had a strong negotiating position. This applied, in particular, to preferential creditors and creditors holding security interests. This is why it was difficult to reach agreement outside of a bankruptcy. The Dutch Scheme prevents unnecessary bankruptcies and thus preserves value for all parties involved.

The procedure

The Dutch Scheme procedure can be conducted in public or in private. By opting for a private procedure, negative publicity can be avoided, which in turn will prevent unnecessary costs or procedures. A choice must be made between the two options before the court is involved in the Dutch Scheme procedure.

Both the ailing debtor and a restructuring expert can offer a composition. The initiative for offering a composition will usually be taken by the debtor. The creditors, shareholders and the debtor itself may petition the court to appoint a restructuring expert. In the first phase, the court will primarily assess whether a debtor is insolvent, i.e. cannot reasonably continue to pay its debts.

While the composition is being drawn up, a cooling-off period may be petitioned. The processing of an application for a suspension of payments or a bankruptcy petition is suspended during the cooling-off period. Furthermore, the debtor, the restructuring expert and creditors may make various petitions to the court in order to protect their interests. For example, the court may be asked to make additional provisions, such as appointing an observer (a supervisor), and the court can review and approve new financing.

The substance of the composition is determined by the debtor or the restructuring expert. In general, debt restructuring will take place through partial payment, debt adjustment or a debt-for-equity swap. The composition must be offered to different classes of creditors that hold equal positions. This includes, for example, creditors with a right of pledge or a mortgage right, unsecured creditors and shareholders. After creditors and/or shareholders have been assigned to the 'compulsory classes', these classes can then be subdivided so that different creditors can receive different offers.

Each class votes on the composition. If at least one class votes in favour of the composition with a 2/3 majority, the composition may be submitted to the

court for approval. The composition can also be oriented towards a specific class of creditors, without changing the rights and obligations of creditors outside that class. In that case, the composition will be put to a vote for that class only.

The debtor or restructuring expert then submits an application for court approval of the composition. In such cases, the applicant may ask the court to unilaterally amend or terminate an agreement. Any claims for compensation following the termination of an agreement may be included in the composition.

The court assesses whether the application for court approval of a composition meets a number of requirements. The application for court approval of a composition will in any event be rejected if:

- the decision-making process was defective because, for example, the creditors were not properly informed or divided into classes;
- a class of creditors that voted against the composition is worse off than it would have been in the event of a winding-up as part of a bankruptcy;
- the reorganisation value was not fairly distributed, without any reasonable grounds for exception;
- the creditors that qualify as SMEs do not receive at least 20% of their claim;
- a class of creditors that voted against the composition was not given the opportunity to opt for a cash amount, unless the class consists of creditors holding security rights.

If the court approves the composition, it is then binding on all creditors and shareholders that were included in the composition. The entire procedure can be completed within a few weeks. What is more, the court's decision is not open to appeal.

Conclusion

The introduction of the Dutch Scheme entails significant change for companies in financial difficulty. For creditors and companies in difficulty, new opportunities will arise in the field of restructuring. Given the impending economic crisis in connection with the coronavirus, the Dutch Scheme procedure could become a much used instrument.

Wieringa Advocaten

If you have any questions about the Dutch Scheme, a composition or an impending bankruptcy, Wieringa Advocaten has a team specialised in the Dutch Scheme and insolvency law. They keep track of developments and are always on hand to inform you of the options available to you under the Dutch Scheme. Please don't hesitate to contact Peter Bos, Joost van der Grinten or Joram Verstoep. We will gladly assist you!

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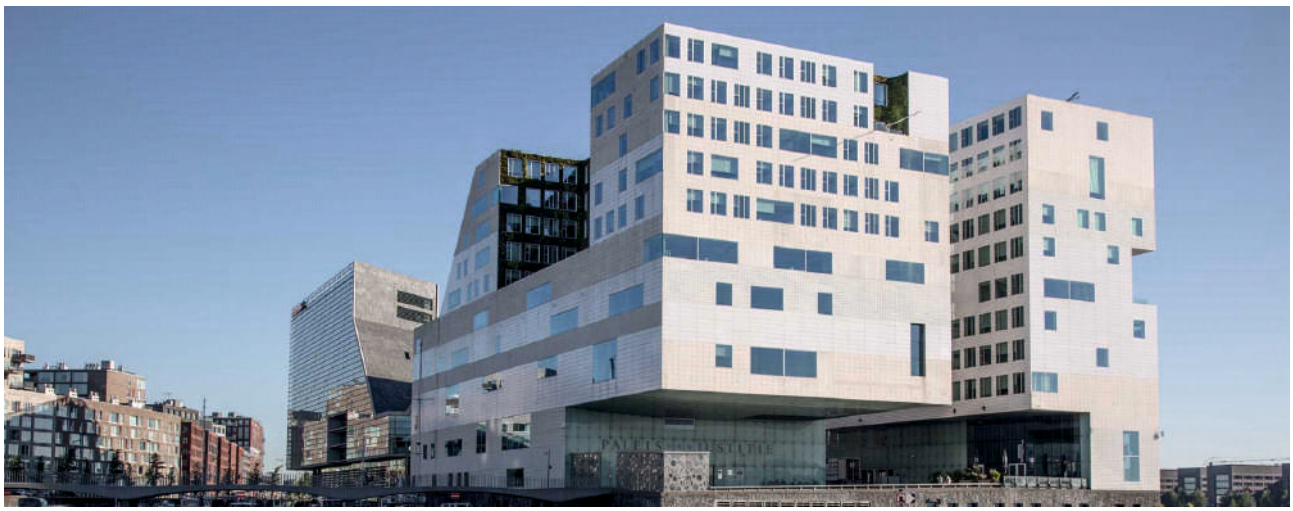

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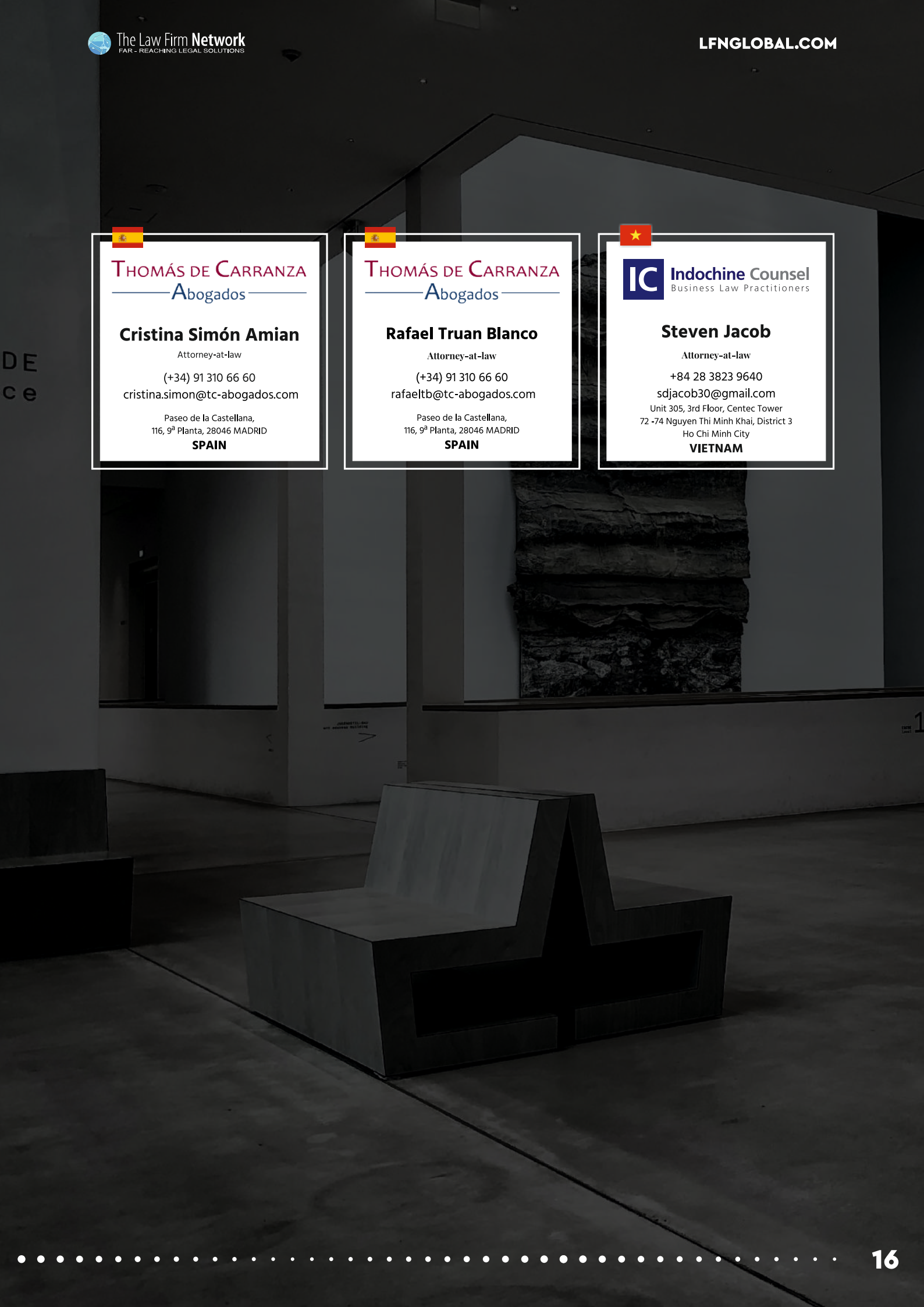

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