

**UNOFFICIAL TRANSLATION OF DRAFT ACT ON DUTCH COURT CONFIRMATION OF EXTRAJUDICIAL RESTRUCTURING PLANS TO AVERT BANKRUPTCY (*WET HOMOLOGATIE ONDERHANDS AKKOORD TER VOORKOMING VAN FAILLISSEMENT*)**

**DRAFT Amendment of the Bankruptcy Act in view of the introduction of the possibility to get court confirmation for an extrajudicial restructuring plan to avert bankruptcy (Act on Court Confirmation of Extrajudicial Restructuring Plans to Avert Bankruptcy)**

**BILL**

We Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc.

Greetings to all who will see or hear these presents! Be it known:

Whereas We have considered that it is desirable to include a regulation in the Bankruptcy Act providing for court confirmation of a restructuring plan concerning the restructuring of debts where this is necessary to avert imminent bankruptcy;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

**Article I**

The **Bankruptcy Act** is amended as follows:

A

A new article 3d is inserted after article 3c, reading:

**Article 3d** [*Stay of the proceedings for hearing a bankruptcy petition if a restructuring plan is offered*]

1. If a debtor has offered a restructuring plan as referred to in article 370, the hearing for a bankruptcy petition filed in relation to that debtor will be stayed for a period of not more than two months, which period may be extended one time by not more than two months, unless:
  - (a) it is unreasonable for the debtor to expect the district court to confirm the restructuring plan as referred to in article 381, or
  - (b) there are other reasons for not allowing a stay.

2. The district court will end the stay of proceedings if there are reasons for the stay not to continue.
3. The district court will only take a decision as referred to in paragraphs 1 and 2 after it has given the debtor and the creditor filing the bankruptcy petition the opportunity, in a manner to be decided by the district court, to express their views.
4. The bankruptcy petition automatically lapses when the district court's decision confirming the restructuring plan, as referred to in article 381, becomes final and with no possibility of appeal.

**B**

In article 5(1), the wording "and 363(1)" is replaced by the wording "363(1), 375, 376(1), 377, 380(1), and 381(3) and (4)."

**C**

A new article 42a is inserted after article 42, reading:

**Article 42a**

If the debtor creates a right of pledge or mortgage before bankruptcy is declared to secure the performance of obligations under a new loan granted to the debtor so that he can make payments reasonably necessary to continue his business as part of a restructuring plan as referred to in article 370, it will be presumed, absent proof to the contrary, that the creditors have not been prejudiced nor that there was any knowledge of this prejudice as referred to in article 42.

**D**

The following wording is added after "was lodged" in article 47: "unless the proceedings for hearing that petition were stayed in accordance with article 3d."

**E**

A new paragraph is added to article 252, reading:

5. The provisions of this article will not apply if the debtor offered a restructuring plan in the three years before the petition was filed and all classes rejected this plan in a vote as referred to in article 378 or the district court refused to confirm the plan pursuant to article 381.

**F**

A new paragraph is added after article 287a(7), reading:

8. The provisions of this article will not apply if the debtor offered a restructuring plan in the three years before the petition was filed and all classes rejected this plan in a vote as referred to in article 378 or the district court refused to confirm the plan pursuant to article 381.

G

A new section is added after article 368, reading:

## **SECTION TWO COURT CONFIRMATION OF A RESTRUCTURING PLAN**

### **§ 1 General Provisions**

#### **Article 369** [*Scope of Application*]

1. The provisions of this Section will not apply to a natural person who does not practise an independent profession or carry on a business, nor to a bank as referred to in article 212g(a), or an insurer as referred to in article 213, in their capacity as debtor.
2. The provisions of this Section regarding voting creditors or shareholders apply to the creditors and shareholders who are entitled to vote in accordance with article 378(2).
3. The provisions of this Section regarding the district court apply to the district court that has jurisdiction, pursuant to article 2, to declare the debtor bankrupt.
4. If the debtor offers a restructuring plan as referred to in article 370(1) that also pertains to claims for which a party other than the creditor wholly or mainly holds the economic interest, this other party may, in accordance with article 378(2), vote on the plan in the creditor's place and as it deems fit. In that event, the provisions of this Section that relate to the creditor will apply to that other party.
5. If the debtor offers a restructuring plan as referred to in article 370(1) that also pertains to shares for which depository receipts have been issued, the depository receipt holders may, in accordance with article 378(2), vote on the plan in the creditor's place and as they deem fit. In that event, the provisions of this Section that relate to the creditor will apply to the depository receipt holders. The same applies to usufructuaries.
6. If the debtor is an association or cooperation, the provisions of this Section in respect of shareholders will apply equally to their members.
7. The provisions of this Section regarding creditors apply equally to sureties, third parties to whose assets the debtor's creditors may assert rights, and co-debtors

with rights against the debtor pursuant to articles 6:10 or 6:13 of the Dutch Civil Code or under a contractual arrangement.

8. If the district court appoints an expert as referred to in article 371(1), the provisions of this Section in respect of the debtor will apply equally to that expert.
9. The provisions of this Section do not apply to rights of employees employed by the debtor under employment agreements within the meaning of article 7:610 of the Dutch Civil Code.
10. The provisions of this Section will not apply if the debtor offered a restructuring plan in the three years before the petition was filed and all classes rejected this plan in a vote as referred to in article 378 or the district court refused to confirm the plan pursuant to articles 153, 272, or 381.

## **§ 2 The offer of and vote on a restructuring plan**

### **Article 370** [*Debtor offering a restructuring plan*]

1. A debtor who anticipates that he will be unable to continue paying his due and payable debts may offer creditors and shareholders, or a number of them, a restructuring plan that amends their rights.
2. If it is reasonably likely that, after the district court has confirmed the restructuring plan as referred to in paragraph 1, guarantors, or third parties holding goods to which the debtor's creditors may assert rights, or co-debtors with rights against the debtor, will be in a position that they are unable to continue paying their due and payable debts, the restructuring plan may also provide for an alteration of the rights creditors have against these guarantors, third parties, or co-debtors. In that case the provisions of this Section in respect of the debtor will also apply to these guarantors, third parties, or co-debtors, on the understanding that the debtor remains exclusively authorised to submit a petition as referred to in articles 376(1), 377, and 380(1).
3. If the debtor is a legal entity, articles 38 and 107a and Title 5.3 of Book 2 of the Dutch Civil Code, and any provisions in the articles of association of that entity, or any arrangements agreed between that entity and its shareholders concerning the decision-making by the general meeting will not apply to offering a restructuring plan referred to in paragraph 1 and the implementation of a restructuring plan that is confirmed by the district court in accordance with article 381.

**Article 371** [*Creditor offering a restructuring plan*]

1. If it is reasonably likely that a debtor will be unable to continue paying his debts, his creditor may request the debtor in writing to offer a restructuring plan as referred to in article 370. If the debtor does not state within one week that he will do so or the debtor does make the statement, but does not offer a restructuring plan within a month that may be reasonably expected to be confirmed by the district court as referred to in article 381, the district court may, on the creditor's petition, appoint an expert who may, without the debtor's involvement, offer a restructuring plan.
2. The district court may also, on the creditor's petition, appoint an expert as referred to in paragraph 1 if the debtor has offered a restructuring plan that has not been accepted by any class of voting creditors or shareholders in a vote referred to in article 378, or which the district court has not confirmed pursuant to article 381.
3. The debtor provides the expert referred to in paragraphs 1 and 2, either on request or voluntarily and, where applicable, in the stipulated manner, all information and assistance which the expert requires to perform his task or which the debtor knows or ought to understand to be material in that connection.
4. The expert does not disclose the information provided pursuant to paragraph three to third parties, other than for the purpose of applying the provisions of this Section.
5. The petitions referred to in paragraphs 1 and 2 are heard in chambers. The district court will only take a decision as referred to in paragraphs 1 and 2 after it has given the debtor and the creditor filing the bankruptcy petition the opportunity, in a manner to be decided by the district court, to express their views.
6. The decision of the district court referred to in paragraph 1 cannot be appealed.

**Article 372** [*Reciprocal agreements*]

1. A debtor as referred to in article 370(1) may also propose to a counterparty with which the debtor has concluded a reciprocal agreement, that the agreement be amended. If the counterparty does not accept the proposal, the debtor may have the agreement terminated prematurely, provided the agreement is terminated as from a date on which such agreements usually end according to local custom and the agreed or usual notice period has been observed, on the understanding that a three-month notice period will at any event suffice.
2. Following the change or termination referred to in paragraph 1, the counterparty will have a claim for compensation against the debtor. Section 10 of Title 1 of

Book 6 of the Dutch Civil Code applies. The restructuring plan referred to in article 370(1) may provide for a change in this right to compensation.

3. The offer of a restructuring plan as referred to in paragraph 1 and any events directly related to the offer do not constitute grounds for amending commitments or obligations of or towards the debtor, for suspending the performance of an obligation towards the debtor and for rescinding an agreement entered into with the debtor.

**Article 373** [*Class composition of creditors and shareholders*]

Where a restructuring plan concerns creditors or shareholders holding interests or rights, or acquiring rights under the restructuring plan that are so different that a comparable position cannot be deemed to exist, those creditors and shareholders are divided into different classes. In any event, creditors or shareholders who would be ranked differently in any bankruptcy proceedings are divided into different classes.

**Article 374** [*Restructuring plan*]

1. The restructuring plan includes all information needed by voting creditors and shareholders to form an informed opinion on the restructuring plan before the vote referred to in article 378 is held including, in any event:
  - (a) the class composition and criteria based on which the creditors and shareholders are divided into one or more classes;
  - (b) the financial consequences of the restructuring plan for each class of creditors and shareholders;
  - (c) the anticipated value of the debtor's assets and activities if the restructuring plan is accepted, stating the applied valuation method and the anticipated proceeds in the event of liquidation of the bankrupt debtor's assets;
  - (d) if the restructuring plan involves an attribution of rights to the creditors and shareholders: the moment or moments when these rights are attributed;
  - (e) the manner in which the creditors and shareholders may obtain additional information about the restructuring plan; and
  - (f) the procedure to be followed for voting on the restructuring plan and when it will take place, or at which the votes must have been cast at the latest.
2. The following documents are, in any event, added to the restructuring plan:

- (a) the list referred to in article 96, with adequate supporting documents, and
  - (b) a list specifying:
    - 1°. the voting creditors and shareholders by name or, where this is not possible, by referring to one or more debt categories,
    - 2°. the amount of their claims or the nominal amount of their shares, and
    - 3°. the classes into which they are divided.
3. An order in council may further stipulate what other information the restructuring plan or additional documents should contain, and how this information is to be provided.

**Article 375** [Temporary Stay]

- 1. Where a debtor has offered a restructuring plan as referred to in article 370, he may ask the district court to set a temporary stay. During this period, no longer than two months, third parties may only exercise a right of recourse on goods forming part of the debtor's assets or a right to claim goods in the debtor's possession, with the district court's authorisation. The district court may extend this period once by a period of no more than two months.
- 2. The petition referred to in paragraph 1 will be denied if the district court cannot reasonably be expected to confirm the restructuring plan referred to in article 381.
- 3. Articles 241a(2) and (3), 241c, and 241d apply equally, on the understanding that the analogous application of article 241a(3) refers to a term imposed on the debtor.
- 4. The district court will end the temporary stay if there are reasons not to continue it. The district court will only do so after it has given the debtor, in a manner to be decided by the district court, the opportunity to express his views.
- 5. The decision of the district court referred to in this article cannot be appealed.

**Article 376** [Disputes during a phase in which negotiations on the restructuring plan are still ongoing]

- 1. Until the debtor submits the final restructuring plan to the creditors and shareholders in accordance with article 378(1), the debtor may ask the district court to settle disputes concerning:
  - (a) the debtor's right to offer a restructuring plan pursuant to this Section;

- (b) the content of the information included in the restructuring plan or in the documents attached to the plan;
  - (c) whether a creditor or shareholder is allowed to vote;
  - (d) the class constitution;
  - (e) the voting procedure, or
  - (f) whether grounds for refusal as referred to in article 381(2) and (3) would prevent court confirmation for the restructuring plan even if all classes have accepted the restructuring plan.
2. In the event of a dispute about whether a creditor or shareholder is allowed to vote, or about the amount of a creditor's claim or the nominal amount of a shareholder's share, the district court will decide whether, and for what amount, this creditor or shareholder will be allowed to vote on the restructuring plan. Article 147 applies equally.
3. The district court may, in connection with the decision it is to take, appoint one or more experts to conduct an investigation and to report on their findings, explaining their arguments, within a period to be set by the district court.
4. If any information referred to in article 374 is not included in the restructuring plan or the documents attached to the plan, the district court may allow the debtor a reasonable period to submit the missing information, before taking the decision as referred to in paragraphs 1 and 3.
5. Petitions as referred to in paragraphs 1 are heard in chambers. The district court will only take its decision after it has given the debtor and the creditors or shareholders involved in the dispute the opportunity, in a manner to be decided by the district court, to express their views.
6. The decision of the district court referred to in this article cannot be appealed.

**Article 377** [Tailor-made provision]

If a debtor has offered a restructuring plan as referred to in article 370, the district court may, at the debtor's request or on its own initiative, make any determinations or take any measures it deems necessary to protect the interests of the creditors or the shareholders. The district court may also do this when

- (a) staying the proceedings for hearing the bankruptcy petition as referred to in article 3d paragraph 1, at the request of the creditor referred to in that paragraph;



- (b) when pronouncing a temporary stay as referred to in article 375 paragraph 1, at the request of the third parties referred to in that paragraph, or
- (c) when taking a decision as referred to in article 376 paragraphs 1 and 2, at the request of the creditors or shareholders involved in the dispute.

**Article 378** [*Voting procedure and voting right*]

1. The debtor presents the final restructuring plan to the voting creditors and shareholders during a reasonable period prior to the vote, which may not be shorter than eight days, or notifies them how they can examine the plan, to allow them to form an informed opinion about the plan.
2. Voting creditors and shareholders are creditors and shareholders whose rights are amended as a result of the restructuring plan.
3. The restructuring plan is voted on by class of creditor or shareholder, in accordance with the information provided in article 374(1)(f), at an actual meeting or, at a meeting held by electronic communication, or in writing.
4. A class of creditors will have accepted the restructuring plan if the decision to accept the plan has been taken by a group of creditors who together represents at least two thirds of the total amount of the claims held by the creditors of that class who have cast their votes.
5. A class of shareholders will have accepted the restructuring plan if the decision to accept has been taken by a majority of at least two thirds of the votes cast.

**Article 379** [*Reporting*]

1. As soon as possible after the vote, but no later than seven days after, the debtor prepares a report, which states:
  - (a) the names of the creditors and shareholders who have cast their votes;
  - (b) the outcome of the vote;
  - (c) the creditors and shareholders who voted in favour or against the restructuring plan, together with the amount of their claims or the nominal amount of their shares, and
  - (d) any other business discussed at the meeting where the vote was held.
2. The debtor ensures that the voting creditors and shareholders can promptly examine the report. If the debtor submits a petition as referred to in article 380(1),

he will file the report with the office of the clerk of the court. The report is available for inspection by the voting creditors and shareholders free of charge for a period of eight days.

### **§ 3 Court confirmation for the restructuring plan**

#### **Article 380** [Scheduling the hearing of the restructuring plan]

1. If at least one class has accepted the restructuring plan, the debtor may submit a petition to the district court to confirm the restructuring plan. The district court schedules a hearing as soon as possible to consider the confirmation. The debtor notifies the voting creditors and shareholders in writing of the hearing date.
2. The hearing takes place at least eight days, but no more than fourteen days after the report referred to in article 379 has been made available for inspection at the office of the clerk of the court.
3. Until the hearing date referred to in the preceding paragraph, the creditors and shareholders who voted against the restructuring plan may submit a petition to the district court as referred to in article 381 paragraphs 3 and 4, setting out the grounds why the district court should refuse to confirm the plan. A creditor or shareholder may no longer invoke any grounds for refusal if that creditor or shareholder has not promptly complained to the debtor after he discovered or reasonably ought to have discovered the potential existence of those grounds for refusal.

#### **Article 381** [Court confirmation]

1. The district court takes a reasoned decision confirming the restructuring plan as soon as possible, unless one of the grounds for refusal referred to in paragraphs 2-4 applies.
2. The district court examines on its own initiative whether the debtor has complied with article 378(1) and 380(1) in relation to all voting creditors and shareholders. Where this is not the case, the district court will refuse its confirmation, unless the creditors and shareholders concerned state that they accept the restructuring plan.
3. The district court will refuse confirmation further to a petition by one or more creditors or shareholders who voted against the restructuring plan, if:
  - (a) the debtor had no right to offer a restructuring plan pursuant to this Section;
  - (b) the information included in the restructuring plan or the documents attached to the plan was inadequate, or if the class composition did not

- meet the requirements of article 372, or if the voting procedure did not meet the relevant requirements, unless the outcome of the vote could not reasonably have been affected by such a deficiency;
- (c) a creditor or shareholder should have been allowed to vote on the restructuring plan for a different amount, unless the outcome of the vote could not reasonably have been affected by this decision;
  - (d) if it summarily appears that these creditors or shareholders would acquire rights under the restructuring plan of a considerably lower value than the payment they would be expected to receive after liquidation of the bankrupt debtor's assets;
  - (e) compliance with the restructuring plan is insufficiently guaranteed;
  - (f) the restructuring plan has been reached by deceit, or by favouring one or more voting creditors or shareholders, or by other unfair means, irrespective of whether this happened with the collusion of the debtor or another party;
  - (g) an amount covering the experts' fees and disbursements has not been deposited or security for it has not been provided, or
  - (h) if there are other compelling reasons to oppose confirmation.
4. The district court will refuse confirmation of a restructuring plan that has not been accepted by all classes, if a petition for that refusal is submitted by one or more creditors or shareholders who voted against the restructuring plan and who are classified into a class that did not accept the restructuring plan and that comprises:
- (a) creditors or shareholders who would acquire rights under the restructuring plan that have a lower value than the amount of the claims or the nominal amount of the shares based on which they should be classified into that class, while there are one or more lower-ranking classes of creditors or shareholders who acquire or retain rights under the restructuring plan, unless the acquisition of these rights constitutes a competitive consideration for credit extended by these other creditors or shareholders in the form of a loan or new capital;
  - (b) creditors or shareholders who would acquire rights under the restructuring plan that have a lower value than the amount of the claims or the nominal amount of the shares based on which they should be classified into that class, while there are one or more higher-ranking classes of creditors or shareholders who acquire rights under the

restructuring plan that represent a higher value than the amount of the claims or the nominal amount of the shares based on which they should to be classified into that class;

- (c) creditors or shareholders who without reasonable grounds would acquire rights under the restructuring plan that represent a lower value relative to the rights acquired by another class of creditors or shareholders with the same ranking;
  - (d) creditors or shareholders whose rights are amended as a result of the restructuring plan, while there are other creditors or shareholders with equal or lower ranking who are excluded from the restructuring plan without reasonable grounds, or
  - (e) creditors who are not entitled to any payment in cash under the restructuring plan equal to the amount that they would be expected to receive if the debtor's assets were to be liquidated in a bankruptcy.
5. The district court's decision confirming the restructuring plan may provide that, after it has become final and without the possibility of appeal, the decision will replace a resolution of the debtor's general meeting required for the implementation of the restructuring plan.
6. The district court's decision as referred to in paragraph 1 cannot be appealed, with the exception of appeal to the Supreme Court in the interest of the law.

#### **§ 4 Consequences of court confirmation for the restructuring plan**

##### **Article 382** [Binding force of the restructuring plan]

1. The court-confirmed restructuring plan is binding on all creditors and shareholders who are entitled to vote.
2. Articles 2:81 and 2:192 of the Dutch Civil Code do not apply where the debtor is a public limited company (*naamloze vennootschap*) or a private limited company (*besloten vennootschap*).

##### **Article 383** [Title to enforcement]

A decision granting court confirmation that has become final and without the possibility of appeal provides the creditors who have claims that the debtor has not disputed with a title for enforcement against the debtor and against the persons who acceded to the restructuring plan as sureties, in so far as the nature of the rights that the creditors acquire under the restructuring plan do not preclude this.

**Article 384** [*Non-performance of the restructuring plan*]

The debtor is in default each time he fails to perform the restructuring plan and the debtor is obliged to compensate any damage suffered by the creditors or shareholders as a result, unless the non-performance cannot be attributed to him. Article 75 and Section 10 of Title 1 of Book 6 of the Dutch Civil Code apply equally. The restructuring plan may exclude the possibility of rescinding or nullifying the restructuring plan.

**Article II Concurrence**

[PM]

**Article III Entry into force**

This Act will enter into force on a date to be determined by royal decree, which date may be set differently for the various articles or Sections thereof.

**Article IV Short title**

This Act may be cited as: Act on Court Confirmation of Extrajudicial Restructuring Plans to Avert Bankruptcy.

We order and command that this Act be published in the Bulletin of Acts and Decrees, and that all ministerial departments, authorities, bodies and officials whom it may concern diligently implement it

Done at,

The Minister of Security and Justice