DE BRAUW
BLACKSTONE
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DRAFT Amendment to the Bankruptcy Act introducing the possibility of obtaining court confirmation of extrajudicial restructuring plans to avert bankruptcy (*Wet homologatie onderhands akkoord ter voorkoming van faillissement*)

UNOFFICIAL TRANSLATION OF THE EXPLANATORY MEMORANDUM

I General Section

1. Purpose and content of the bill

This bill introduces provisions in the Dutch Bankruptcy Act ("DBA") allowing the district court to confirm an extrajudicial restructuring plan between a company and its creditors and shareholders, if this may prevent the debtor going bankrupt. As a result of the court confirmation, the restructuring plan is binding on all creditors and shareholders involved in the plan. This means that creditors or shareholders who have not voted in favour of the restructuring plan can still be bound by it. For this reason, the term 'compulsive restructuring plan' is used in this context.

The proposed provisions are aimed at companies that, although their activities are profitable, nevertheless threaten to become insolvent due to an excessive debt burden. The object is to increase these companies' abilities to reorganise and to avoid that a small group of creditors or shareholders may harm the interests of the other parties involved in the company (including other creditors and employees) by unduly attempting to prevent a restructuring that may still avert bankruptcy.

The new provisions are intended to reinforce the out-of-court debt restructuring process; the possibility of a compulsory restructuring plan must be regarded as a 'last resort'. The debtor (company) is expected to initially try and reach an amicable restructuring plan with its creditors and shareholders. Only if this fails, may the alternative of a compulsory restructuring plan be applied.

The bill forms part of the 'Insolvency Law Review' programme. This programme is founded on three pillars, as the Lower House of the Dutch parliament was informed by letter dated 26 November 2012: (i) combatting fraud, (ii) increasing companies' abilities to reorganise, and (iii) modernising the bankruptcy procedure. This bill constitutes the second pillar: increasing companies' abilities to reorganise (the reorganisation pillar). This pillar encompasses measures aimed at strengthening companies' reorganizational capabilities and preventing bankruptcies, or, if this proves impossible, to ensure a proper completion of the bankruptcy process. This serves the interests of both the company and its stakeholders, including creditors and employees. It is anticipated that this second pillar will comprise three bills in total, including the present one. The other two bills will introduce:

(i) provisions setting out an explicit statutory basis for a method, developed in practice, also referred to as "pre-pack", whereby shortly before an anticipated bankruptcy of a company the district court silently designates, at the management board's request, the person who will be appointed bankruptcy trustee if a bankruptcy declaration is issued: the Continuity of Companies Act I (WCO I) , and

(ii) various measures aimed at enabling the bankruptcy trustee to efficiently complete the bankruptcy, in a manner that will limit to all possible extent the loss of all those involved in the bankruptcy.

2. Background; Reason for the bill

If companies of a certain size run into serious financial problems, it is usual for their management board or the persons actually in charge (hereinafter, in brief: the board) to seek the help of advisers to help them find a solution. Often, the creditors will be contacted and asked to accept a suspension of payment or a partial cancellation of the debt. However, for as long as no bankruptcy declaration is issued and no suspension of payments is granted, reaching such agreements is governed by the general rules of property law and creditors are entitled to claim full payment of the debt. Only in very special circumstances – based on the doctrine of abuse of authority (Article 3:13 Dutch Civil Code, "DCC") – may there be room for ordering a creditor to cooperate with the implementation of a restructuring plan. According to the Dutch Supreme Court it is, in principle, incumbent on the debtor who wishes to enforce such cooperation through the court to assert and provide evidence of specific facts and circumstances from which it may be concluded that the creditor may reasonably not refuse to accept the restructuring plan.

The financial problems may also be solved by raising new capital, whereby shareholders are asked to make an additional investment in the company or to agree with the issue of new shares to attract new investors (cf. Articles 2:96a and 206a DCC). The shareholders must, in principle, be free to offer or withhold their cooperation and cannot be forced to take new shares (Articles 2:81 and 192 DCC). In view of the financial difficulties of the company, the district court may set aside the shareholders' pre-emptive rights to new shares (see decision Enterprise Chamber, 31 December 2009, Inter Access, ECLI:NL:HAMS:2009:BL3680).

In practice, this means that, outside a suspension of payments or bankruptcy, there are few means by which creditors and shareholders can be compelled to cooperate with a restructuring plan, even if this is the only way to avoid bankruptcy and there is ample support for realising the restructuring plan and no creditor or shareholder would be brought in a materially adverse position as a result of the restructuring plan. If a restructuring plan is blocked, the other creditors and shareholders, who indeed wish to save the company, usually have no other option than to fully grant the creditors or shareholders that refuse to accept the restructuring plan their wishes. Often, this will mean that the refusing creditor is able to demand full payment of his claim or that the rights of the shareholder remain unaffected and that the creditors that do wish to accept the restructuring plan are forced to shoulder a disproportionate share of the costs of the restructuring. Partially for this reason, legal practitioners and commentators have suggested introducing a compulsory restructuring plan outside bankruptcy and suspension of payments. A similar scheme of arrangement already exists in the United States and the United Kingdom and various EU Member States have introduced comparable schemes. Some of these schemes were mentioned and discussed in outline in the explanatory notes to the earlier draft of this bill, which was discussed at the end of 2014. The European Commission has put the urgent need for effective restructuring measures at European level on the agenda, most recently by publishing a proposal for a new directive on preventive restructuring frameworks, second chance, and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. These developments underline the usefulness and necessity of introducing provisions for a compulsory restructuring plan outside bankruptcy and suspension of payments.

3. Brief description of the content of the new provisions

3.1 Introduction

The bill contains provisions on the basis of which the district court may confirm a plan providing for a restructuring of the debts of a debtor, which also binds the creditors or shareholders that did not vote in favour of it (Article 382). The proposed provisions are divided into four paragraphs:

§ 1. General provisions;

§ 2. The offer of and vote on a restructuring plan;

§ 3. Court confirmation of the restructuring plan, and

§ 4. Consequences of the court confirmation of the restructuring plan.

The starting point in the new provisions is that the debtor first tries to reach an amicable restructuring plan with his creditors and shareholders. Only if this fails, may the alternative of a compulsory restructuring plan be considered. A restructuring plan may consequently only be confirmed by the district court after a procedure has been completed whereby various requirements are observed as regards the offer, the content, and the set-up of the restructuring plan, and after the creditors and shareholders have been given the opportunity to vote on it. The legal position of the individual employees may not be amended as a result of the restructuring plan and is consequently safeguarded.

A compulsory restructuring plan may furthermore only be considered if this is justified in the circumstances. For this reason, the restructuring plan must meet the following criteria:

1. effecting the restructuring plan is necessary and adequate to avert an imminent bankruptcy of the company;

2. there is at least one class of creditors or shareholders involved of which a large majority supports the restructuring plan, and

3. the restructuring plan is reasonable, in the sense that the aggregate interests of the creditors and shareholders involved in the restructuring plan benefit, or are at the very least not prejudiced, if the restructuring plan is effected, which means in any case that:

   (a) the creditors and shareholders may not end up in a materially worse position as a result of the restructuring plan than they would be in the event of bankruptcy, and

   (b) the costs of the restructuring required by the restructuring plan, and the value to be realised with the restructuring plan (i.e. the "going concern" value of the company concerned) is fairly distributed among the various classes of creditors and shareholders.

To offer the parties as much room as possible to effect, in proper consultation, a restructuring plan that is adapted to the specific circumstances of the case at hand, the new provisions have been drafted as much as possible in the form of a framework. Until it is asked to approve the restructuring plan, the district court's involvement of is limited, in principle. If prior to the vote on the restructuring plan a difference of opinion arises between the parties on whether the adopted procedure or the proposed restructuring plan meets the statutory preconditions, they should resolve this among themselves. Referring the matter to the district court too soon may unnecessarily escalate the situation, thus reducing the possibility of reaching an amicable settlement. Should it prove to be impossible to find a solution, the new provisions still offer the debtor the possibility to refer the dispute to the district court, to prevent that the negotiations are made unnecessarily harder. It will then become possible to realise final deal certainty as yet, i.e. that clarity is obtained as to whether the offered restructuring plan will be accepted or whether the procedure should be revised and/or the offered restructuring plan modified.

Lastly, the proposed provisions clarify what the consequences of the plan's confirmation by the district court, or of non-compliance with the plan, will be for the debtor, creditors and shareholders involved.

These key elements of the new provisions will be briefly discussed in more detail below.

3.2 Offer, content, and set-up of the restructuring plan

Offering the restructuring plan

The starting point of the plan is that the debtor takes the initiative, in principle, to effect a restructuring plan (Article 370). If the debtor does not make a proposal to his creditors and shareholders for a restructuring plan, even though it is clear that this is the only way to avert an imminent bankruptcy, or if he does make a proposal but it is so defective that it cannot be considered a viable attempt, the new provisions also allow creditors to initiate a restructuring plan. This also applies where an attempt by the debtor to effect a restructuring plan failed because no class agreed to the proposed restructuring plan or because the district court did not confirm it. In these situations, the creditors may ask the district court to appoint an expert to draft a proposal for a restructuring plan and initiate a procedure that may lead to court confirmation of the restructuring plan (Articles 369(8) and 371(1) and (2)). If the district court decides to appoint an expert, the debtor is obliged to provide this expert with all information and cooperation the latter may require in order to accomplish his task (Article 371(3)). The expert may only share the information received with third parties where this is necessary within the context of effecting the restructuring plan (Article 371(4)). Since it is anticipated that this scenario, in which the creditors take the initiative, will mainly act as a safety net and, if necessary, serve as an extra incentive for the debtor to take action in good time, these general explanatory notes will only concentrate on the first scenario, i.e. where the debtor offers the restructuring plan.

It is provided that the compulsory restructuring plan may amend the rights and claims of all classes of creditors. Thus, unlike a composition or a suspension of payments, a restructuring plan formed on the basis of the proposed plan may also lead to an amendment of the rights of the preferential and secured creditors (Article 370(1)). The restructuring plan may also provide for an amendment of the rights of guarantors, of third parties against whom creditors of the debtor may exercise rights, and co-debtors against the debtor, and the rights of the creditors towards these parties (Article 369(7), and 370(2)). As a result, the restructuring of a group of companies may be completed in one go. The restructuring plan may not only focus on a “principal debtor”, but also on the companies within the group that act as guarantor or that have provided security for the principal debtor.

The proposed plan also offers the debtor the possibility to restructure future commitments under existing agreements, in addition to his existing debts. This may for instance refer to the rent of an office building that must be reduced to prevent it from dragging the company down and preventing a successful reorganisation. The plan provides that the debtor may make his counterparty a proposal to this effect. If this party refuses the proposal, the debtor may terminate the agreement. The counterparty’s entitlement to compensation following the amendment or termination of the agreement may be included by the debtor in the restructuring plan (Article 372). The restructuring plan may not amend the debtor's commitments towards his employees under an employment contract or Title 10 of Book 7 of the Dutch Civil Code (Article 369(9)).

Apart from changing the rights of creditors, the restructuring plan may also amend the rights of shareholders (Article 370(1)). This pertains specifically to a restructuring plan for a "debt for equity swap". There are many examples of a "debt for equity swap", but what they basically come down to is that part of the creditors' claims are converted into equity, thus providing the creditors with a stake in the company and therefore with the possibility to exert control over the company (while simultaneously watering down the interests of existing shareholders). As a rule, a share issue requires a resolution passed by the general meeting (Article 2:96/206 DCC). In addition, existing shareholders have a pre-emptive right to acquire shares at each issue of ordinary shares (Article 2:96a/206a DCC). In connection with a compulsory restructuring plan, these rules will not apply where a private limited liability company is concerned (Articles 370(3) and 382(2)). If the debtor is a public limited liability company, the application is prohibited under the revised second company directive (2012/30/EU).

The debtor may decide to offer all his creditors and shareholders a restructuring plan, or only certain creditors or shareholders; for instance a restructuring plan aimed solely at rescheduling or restructuring the debts owed to financers, while leaving out debts owed to ordinary trade creditors (Article 370(1)). In the latter instance, the debtor will only have to submit the restructuring plan to the specified group of creditors or shareholders (Article 378(1)), which offers the possibility to form a restructuring plan in relative quiet and avoid negative publicity regarding the financial problems, with all adverse consequences this may have. However, the restructuring plan will only be confirmed by the district court if:

- the debtor offers a reasonable ground for his decision to exclude certain creditors or shareholders from the restructuring plan and therefore not asking them to bear part of the costs of the restructuring, or

- the equal or higher-ranking classes of creditors or shareholders vote with an ample majority in favour of the restructuring plan and thus in favour of the decision to exclude certain creditors and shareholders (Article 381(4)(d)).

Content and set-up of the restructuring plan

The debtor is free, in theory, to decide what to offer his creditors and shareholders and how to set up the restructuring plan. The debtor himself will know best how he stands the best chance to convince his creditors and shareholders to vote in favour of a restructuring plan. However, if the debtor wishes to subsequently avail himself of the possibility of a compulsory restructuring plan, its content and set-up must satisfy a number of procedural preconditions (Articles 373 and 374). For one thing, the debtor must include in the restructuring plan and in the documents to be submitted with it specific information as prescribed by law, to ensure that the creditors and shareholders have been able to form a considered opinion when called upon to vote on the restructuring plan (Article 378(1)).

Where the restructuring plan involves several classes of creditors and shareholders – i.e. creditors or shareholders whose interests or rights are so divergent that they cannot be said to be in a comparable position – the restructuring plan must provide for a class composition (Article 373). This means that:

- the different categories of creditors and shareholders must be divided into separate classes (Article 373);
- each class must be offered a debt rescheduling proposal tailored to the rights of the creditors or shareholders of that class (Article 374), and
- each class votes separately on the restructuring plan (Article 378(3)).

In any event, creditors or shareholders that would not rank equally in the event of bankruptcy, will be divided into separate classes, e.g. a class of preferential creditors; a class of creditors with a retention of title; creditors with a retention right; and ordinary creditors. The debtor may subdivide any class into sub-classes and may make each of these sub-classes a separate offer; a particular class may even be apportioned more than other classes. In the latter event, however, the restructuring plan will only be eligible for court confirmation if:

- the debtor offers a reasonable ground for the distinction he makes, or
- the class receiving less votes with an ample majority in favour of the restructuring plan and therefore in favour of the decision to make another class a better offer (Article 381(4)(c)).

3.3 Voting procedure and voting right

<u>Voting right and participation in the decision-making</u>

The creditors and shareholders whose rights are affected by the restructuring plan are entitled to express their views on the restructuring plan by voting on it (Article 378(2)). This means that creditors or shareholders whose rights are not affected by the restructuring plan do not have to be informed of the restructuring plan or participate in the vote. Since the restructuring plan cannot amend the debtor's commitments towards his employees, employees will under no circumstances be considered voting creditors. However, a restructuring plan will usually be part of a broader reorganisation whereby in order to save costs, the business operations will undergo changes as well, in addition to a restructuring of debts. Other legislation may stipulate that parties not directly affected by the restructuring plan must nevertheless be involved in the process. For instance, the

Works Councils Act ("WCA") grants employee participation bodies the right to advise on several proposed decisions of the company, including decisions concerning:

- a "significant scaling down or expansion of, or other change in the activities of the company" (d);
- a "significant change in the organisation of the company, or in the allocation of tasks within the company" (e), or
- "raising considerable credit for the benefit of the company" (i).

If the broader reorganisation of which the restructuring plan is part includes such a decision, the works council will be asked, pursuant to Article 25 WCA, to advice on the decision. It will stand to reason that the company asks this advice in good time. Any uncertainty there might be as to whether the works council accepts a reorganisation would also affect the question whether the restructuring plan is sufficient to avoid bankruptcy and thus whether the restructuring plan is eligible for court confirmation. If this objection is raised during the district court hearing of the request for confirmation, the district court may be forced to refuse confirmation (Article 381(3)).

Voting procedure

To give the creditors and shareholders sufficient opportunity to assess the restructuring plan and understand its consequences for them, the final restructuring plan must be made available to the voting creditors and shareholders during a reasonable period of time of not less than eight days before the vote (Article 378(1)). If the restructuring plan provides for a class composition, the restructuring plan will be voted on by each class separately (Article 378(3)). The method of voting is decided by the debtor. The vote may take place in writing. The debtor may also decide to call a meeting in which the vote will take place, which meeting may also be held by electronic means of communication (Article 378(3)).

Outcome of the vote

Only creditors or shareholders that have cast a vote will be considered when determining the outcome of the vote. This will prevent that creditors or shareholders who have not taken the trouble to vote may, intentionally or not, reduce the odds that the restructuring plan will be accepted.

Acceptance of a restructuring plan by a class of creditors requires that it is endorsed by a group of creditors that together represent at least two thirds of the aggregate claims of the creditors in that class that have voted. The same applies to a class of shareholders, on the understanding that the number of votes cast by the shareholders of that class in favour of the restructuring plan relative to the total votes cast by that class are considered (Article 378(4) and (5)).

After the vote the debtor must prepare a report stating – in brief – the outcome of the vote, and must ensure that the creditors and shareholders involved are able to promptly take note of the report. This is especially important if the debtor decides to submit a request to the district court to confirm the restructuring plan, since the report contains also all information relevant for creditors or shareholders that voted against the restructuring plan and that are considering asking the district court to withhold its confirmation (Article 380(3)). The information in the report will allow these creditors and shareholders to assess the chances of success of such a request and they may use it in support of their objections, should they decide to submit a request to the district court to withhold confirmation. If the debtor submits a request for court confirmation, the report must be filed with the office of the clerk of the court that will hear the request. The voting creditors and shareholders will then have the opportunity to inspect the report, free of charge, during a period of eight days (Article 379). It is in the debtor's own interest to file the report as quickly as possible, because the date on which the request for court confirmation will be heard must be set between eight and fourteen days after the report is filed (Article 380(2)).

3.4 Court confirmation of the restructuring plan

The restructuring plan will be confirmed by the district court if at least one class has voted in favour of it (Article 380(1)). The creditors and shareholders that voted against the restructuring plan may submit a request to the district court to withhold confirmation until the day of the hearing, on the understanding that the creditors or shareholders may no longer invoke the grounds for refusing court confirmation of a restructuring plan accepted by all classes if they were previously aware of these grounds but never raised them with the debtor (Article 380(3)). This will encourage the creditors and shareholders to raise any crucial objections to the restructuring plan in good time (i.e. before the vote), and will allow the debtor to find a solution for these objections before the vote, either through the district court or otherwise. This will give the debtor the possibility to revise the restructuring plan, if needed, and remove any obstacles that would prevent court confirmation. This will avoid continuing a procedure that appears to have no chance of success and incurring unnecessary costs.

The district court will decide on the request for court confirmation as quickly as possible. Before doing so, the district court will determine, on its own initiative, whether all creditors or shareholders that are affected by the restructuring plan have been properly notified of it and have been given the opportunity to vote on it, and have also been notified of the date on which the request for court confirmation will be heard (Article 381(2)). If this has been the case and nobody has raised any objections to court confirmation, the district court will grant the request. The district court will only review the restructuring plan in depth if one or more of the creditors or shareholders who voted against it have objected to the court confirmation, invoking one or more of the statutory grounds for refusal (Article 380(3) and (4)).

The district court will still withhold its confirmation to a restructuring plan that is accepted by all classes of creditors and shareholders if one of the following general grounds of refusal occurs:

- The procedural requirements for offering the restructuring plan and its contents and set-up or the voting procedure have not been properly observed (Article 381(3)(a)-(c));

- The restructuring plan is unreasonable because there are creditors or shareholders that would be placed in a materially worse position as a result of the restructuring plan than they would be in if the debtor was declared bankrupt (Article 381(3)(d)), or

- One or more of the grounds of refusal exist that already apply to the restructuring plan during suspension of payments or bankruptcy (Article 381(3)(e)-(h)).

Some additional grounds of refusal apply where not all classes have voted in favour of the restructuring plan. These entail that the district court must also withhold its confirmation of the restructuring plan if it includes a plan whereby – in brief – the costs of the restructuring or the value that may be realised with the restructuring plan (i.e. the going concern value of the company) is not fairly distributed among the various classes of creditors and shareholders. The criteria applied to determine whether this is the case are derived from several rules of the American Chapter 11 procedure, e.g. the absolute priority rule (Article 381(4)).

The decision of the district court on the request for court confirmation is not open to appeal or further appeal to the Supreme Court (Article 381(6)). This is justified because the restructuring plan is effected in the dire situation of an imminent bankruptcy (Article 370(1)). To avert bankruptcy, the restructuring plan must be implemented immediately after court confirmation is obtained. However, some questions regarding the proper application of the proposed plan may end up before the Supreme Court via other channels. For instance, when considering a request pursuant to Article 376 or 381, the district court may refer questions regarding the application of a specific provision to the Supreme Court for a preliminary ruling, either on its own initiative or further to a request from the debtor, a creditor or a shareholder (Article 392 ff. Dutch Code of Civil Procedure). Another possibility is that the procurator general takes an appeal to the Supreme Court in the interest of the law (Article 78(1) Judiciary (Organisation) Act).

3.5 Consequences of court confirmation of the restructuring plan

Once the district court has confirmed the restructuring plan, it is binding on all creditors and shareholders that were entitled to vote on it. This means that the creditors or shareholders that did not vote or that voted against the restructuring plan are bound to the restructuring plan as well (Article 382).

The decision of the district court to confirm a restructuring plan is enforceable (Article 383). If the debtor fails to perform his obligations under the restructuring plan, or to do so in time, the creditors with claims against him may directly invoke the district court decision to enforce compliance. If the debtor fails to comply or timely comply with the restructuring plan, he is furthermore obliged to compensate for the loss the creditors and shareholders suffer as a result. Possibly, the creditors or shareholders may also have the right to rescind the restructuring plan in that event. However, this right may also be excluded in the restructuring plan. To do so stands to reason if the restructuring plan contains elements that may be problematic to reverse, such as a “debt for equity swap”, whereby the claims of certain creditors have already been converted into shares in the company (Article 384).

3.6 Involvement of the district court

As mentioned and explained earlier, the involvement of the district court is limited until it receives a request for confirmation. However, situations may arise in which it may be preferable to involve the district court at an earlier stage. This is especially the case if, before the vote on the restructuring plan is held, there is uncertainty as to whether a ground for refusal exists that would preclude the district court from granting its confirmation even if all classes of creditors or shareholders have voted in favour of the restructuring plan. If this uncertainty continues to exist until the district court hears the request for confirmation, it might seriously hamper the negotiations on the restructuring plan. The debtor is therefore offered the possibility to submit this question to the district court before the request is heard (Article 376(1)). It should be noted that creditors and shareholders are not offered this possibility. This is to prevent creditors or shareholders that have no intention to cooperate with a restructuring from improperly availing themselves of this possibility to try and block or delay the procedure, or to obtain full payment of their claims, by submitting (or threatening to submit) spurious requests, thereby harming the interests of the other creditors, shareholders and other stakeholders of the company. If the debtor decides not to submit the question at an earlier stage in the procedure, the creditors or shareholders retain the possibility to express their objections at the hearing of the request for court confirmation (Articles 380(3), and 381(3)). Conversely, if the debtor did submit the objections to the district court at an earlier stage and the district court has ruled on the matter, this decision must be considered final and binding. This means that the decision may no longer be reversed in the same instance, unless there are extraordinary circumstances that make it unacceptable that the district court is bound to the final decision on the matter. This is the case, for instance, if the district court has made manifest factual or legal errors or if the decision is based on an incorrect factual ground that may not be attributed to the interested party. Thus, if the district court has already ruled that the procedural preconditions for court confirmation have been met, there is no longer any point for a creditor or shareholder to raise a defence against the court confirmation of the restructuring plan that is based solely on questioning the ground yet again.

3.7 Additional measures to allow the debtor to agree a restructuring plan

The following additional measures are provided to enable a debtor to agree a restructuring plan.

- Following the offer of a restructuring plan, the debtor may ask the district court to order a temporary stay, in respect of all or only certain creditors (Article 375). During this period, of up to two months, which may be extended once by another two months, the creditors concerned may only exercise their right of recourse to assets that form part of the debtor's assets, or demand the return of assets that are in the possession of the debtor, with the authorisation of the district court.

- If a bankruptcy petition is submitted after a restructuring plan has been offered, the debtor may ask the district court to stay the hearing of that petition during a period of up to two months, which period may be extended once for another two months as well (Article 3d).

These measures will prevent creditors or shareholders who have no intention whatsoever to cooperate with a restructuring from having recourse or filing a bankruptcy petition in order to frustrate or delay the procedure, or from demanding full payment of their claims immediately after the restructuring plan is offered, thereby prejudicing the interests of the other creditors, shareholders and other stakeholders of the company. To avoid abuse of the procedure by the debtor – who remains entitled to dispose of his assets throughout the procedure – it is provided that the district court will deny a request for ordering these measures if it cannot reasonably be expected that the restructuring plan will be accepted or if there are other reasons that compel this when a request to stay the proceedings for hearing a bankruptcy petition is submitted (Articles 3d(1) and 375(2)). This would for instance be the case if past experience gives rise to a fear that the debtor will prejudice his creditors. The district court may also, if it does order these measures, make every provision it deems necessary to protect the interests of the creditors or the shareholders (Article 377). These may include, for instance, setting the condition that the vote on the restructuring plan must be held within a certain period of time, or that the debtor must report periodically on the progress of the procedure, or appointing an independent expert to monitor the procedure.

The new Article 42a should also be considered one of these additional measures. This Article aims at raising funds that may facilitate the effectuation of a restructuring plan. Where, within this context, security is provided for such financing and the preconditions set in that Article have been met, it is assumed that this legal act will not subsequently, during the bankruptcy proceedings, be regarded as an *actio pauliana*, i.e. a legal act voluntarily executed by the debtor before bankruptcy and causing creditors to be prejudiced (which act may be annulled by the bankruptcy trustee after the bankruptcy for the benefit of the bankrupt's estate).

EXPLANATORY NOTES TO EACH ARTICLE

Article I

<u>Section A</u>

Article 3d (new)

As soon as creditors are offered a restructuring plan, they know the debtor is having financial difficulties. This may act as an incentive to immediately submit a bankruptcy petition. The new Article 3d allows the debtor to submit a request to the court to stay the hearing of that petition. This Article is one of a category of additional measures aimed at offering the debtor the opportunity to agree a restructuring plan and at denying those creditors that have no intention of cooperating with any restructuring the possibility of adversely impacting the negotiations on a restructuring plan by taking, or threatening to take, action for recourse. At the same time, it is recognised that the debtor may abuse the opportunity of submitting a request to stay the hearing of the petition. The object is not to hand the debtor the means to postpone an inevitable bankruptcy by offering a restructuring plan, while he is reasonably aware or should be aware that this mission is bound to fail. In view of this, Article 3d(1) sets a number of preconditions that must be met to allow the request for staying the hearing of the petition.

First, the hearing of a bankruptcy petition may only be stayed if, at the time of submitting the request, the debtor has already offered his creditors and shareholders a restructuring plan. This does not have to be the definitive restructuring plan that will be voted on in accordance with Article 378, but may also be a preliminary proposal, provided it is sufficiently detailed. This means that the restructuring plan must meet the requirements of Article 374 DBA. It is provided that the request for a stay will not be allowed if “the debtor cannot reasonably expect that the court will confirm the restructuring plan [...] or if there are other grounds that oppose a stay”. If the restructuring plan is insufficiently detailed, the request will be denied on the first ground. Furthermore, there will be zero chance that a restructuring plan will be agreed if it has already been voted on and all classes have voted against it.

Possible “other reasons” for the court to deny the request for a stay include a fear based on past experience with the debtor that he will act in bad faith when managing his assets during the stay, or will try and prejudice his creditors in other ways. Another reason may be that the debtor is not expected to be able to continue meeting his operational payment obligations, i.e. payments related to the continuation of his business activities that arise during the process of drawing the restructuring plan. In that event, the company is in fact already (virtually) insolvent and it is too late to avert bankruptcy.

Before ruling on the request for a stay, the court will allow the debtor and the creditor who submitted the bankruptcy petition the opportunity to express their views (Article 3d(3)).

If the court allows the request and stays the proceedings for hearing the bankruptcy petition, it may make provisions, pursuant to Article 377, to protect the interests of the creditors and the shareholders. The court may do this either on its own initiative or further to a request of the debtor or the creditor who submitted the bankruptcy petition. The court may, for instance, make sure that the creditors and shareholders are given clarity within the shortest possible time on the question whether a restructuring plan will be effected, by stipulating that the debtor must in any event see to it that the restructuring plan is voted on within a specified time and that the debtor regularly informs the district court and the creditors and shareholders involved of progress made.

If, after the court has ruled on the request for a stay, a change in circumstances occurs as a result of which the effectuation of the restructuring plan may no longer be expected, the court will end the stay pursuant to Article 3d(2). In this event as well, the court will offer the debtor and the creditor who submitted the bankruptcy petition the opportunity to express their views (Article 3(3)).

Pursuant to Article 3d(4), the bankruptcy petition will lapse by operation of law once the restructuring plan is confirmed by the court, since this means that as of that moment bankruptcy will have been averted.

In conclusion, it should be noted that this Article not only applies to bankruptcy petitions submitted by creditors whose rights are amended as a result of the restructuring plan, but also to creditors that are not involved in the restructuring plan.

<u>Section B</u>

Article 5 Bankruptcy Act

Article 5 of the DBA provides when legal representation is required if provisions of the DBA are applied. The proposed amendment to Article 5(1) provides that legal representation is required when the following requests are submitted to the court:

- a request for declaring a temporary stay (Article 375);
- a request for settling disputes that arise in the period before the vote on the restructuring plan takes place (Article 376(1));
- a request for applying the tailor-made provision pursuant to which the court may make impose additional measures or make further provisions to protect the interests of the creditors or the shareholders (Article 377);
- a request for court confirmation of a restructuring plan (Article 380(1)), or
- a request for withholding court confirmation of the restructuring plan (Article 380(3)).

The requirement of compulsory legal representation is justified. Before the debtor, a creditor, or a shareholder submits this request, they must be informed of the criteria the request must meet to be allowed by the district court. The involvement of a lawyer will ensure that the request is properly reasoned and substantiated. Furthermore, a lawyer will be able to assess whether or not the request stands a chance of success. A lawyer may, for instance, explain to a creditor or shareholder that if the court has previously ruled, pursuant to Article 376, that none of the grounds of refusal mentioned in Article 381(3) apply, there is no point, within the context of the hearing of the request for court confirmation, in raising a defence against court confirmation on those grounds. This will allow the lawyer to prevent the district court being faced with requests that are already certain to be denied, thus avoiding that the scarce means and capacity of the judicial system are burdened unnecessarily.

Section C

Article 42a Bankruptcy Act (new)

Section C introduces a new Article 42a. As remarked earlier in the general section of this explanatory memorandum, this Article falls within the category of additional measures. This Article aims at stimulating the raising of funds needed to effect a restructuring plan. The Article departs from Article 42 DBA, which includes provisions for setting aside legal acts voluntarily executed by the debtor, causing creditors to be prejudiced (*actio pauliana*) that specifically focuses on bankruptcy. Pursuant to Article 42 DBA, the bankruptcy trustee may annul, for the benefit of the joint creditors, legal acts executed by the debtor in the run-up to the bankruptcy proceedings. The bankruptcy trustee may successfully invoke *actio pauliana* if the following five criteria have been met: (i) the debtor must have executed a legal act before bankruptcy was declared; (ii) he must have executed that act voluntarily; (iii) the creditors are prejudiced as a result of that act; (iv) when executing the legal act the debtor knew or should have known that the creditors would be prejudiced as a result; and (v) those who acted with or towards the debtor also knew or should have known that the creditors would be prejudiced by it.

The new Article 42a refers to the situation in which an attempt is made, before the bankruptcy declaration, to effect a restructuring plan and during that process funding was raised for which new security (a right of pledge or mortgage) was provided. Article 42a provides that the legal act will not subsequently be considered an *actio pauliana* if it was both the debtor's and the lender's express intention when entering into the loan that it would be used by the debtor to meet his operational payment obligations, i.e. payments needed to continue the business activities. In other words, the debtor was to use the loan to make payments that would be necessary to continue his business during the period until the effectuation of the restructuring plan. The bankruptcy trustee may still annul the legal act in the bankruptcy proceedings, provided it can be demonstrated: that (i) the loan was not used to make payments that were necessary in order to continue the business activities in view of a restructuring plan, so that the use of the loan was prejudicial to the creditors, and (ii) the lender was or should have been aware of this and could foresee that this would result in a bankruptcy with a deficit.

Section D

Article 47

The revision of Article 47 DBA proposed in Section D logically ensues from the introduction of the new Article 3d. As explained within the context of Section C, Article 42 DBA provides as one of the conditions for successfully invoking the *actio pauliana* by the bankruptcy trustee that the debtor voluntarily executed the legal act the bankruptcy trustee wishes to annul. Thus, payment by the debtor of a payable debt cannot be affected by invoking an *actio pauliana*. However, Article 47 DBA makes two exceptions. Payment of a payable debt (i.e. a voluntary act) may still be annulled if (i) the creditor knew at the time when the debtor paid the debt that a bankruptcy petition against the debtor had already been submitted, or (ii) the payment was made after consultation between the debtor and the creditor with the intention to favour the creditor at the expense of the other creditors. The proposed revision of Article 47 will result in it not being possible to annul due to knowledge of the creditor that a bankruptcy petition had been submitted if the proceeding for hearing the petition has been stayed pursuant to Article 3d due to the debtor having offered a restructuring plan. This Article also falls within the category of additional measures aimed at enabling the debtor to effect a restructuring plan. The aim of this Article is to ensure that the debtor is still able, during the period in which he tries to effect a restructuring plan, to continue his business activities and to make the necessary payments in that respect.

Section E and F

Articles 252 and 287a

A new paragraph is added to Articles 252 and 287a DBA. If a debtor has submitted a request for a suspension of payments or application for a debt rescheduling arrangement and he has already made an unsuccessful attempt at effecting a compulsory restructuring plan on the basis of the new Section 4.2 in the three preceding years, he may no longer offer his creditors a restructuring plan pursuant to Article 252 DBA or ask the court to declare a debt settlement binding pursuant to Article 287a(1) DBA. If, before the vote on the restructuring plan takes place, the debtor concludes that it would be better to reach an agreement within the context of a restructuring plan or debt rescheduling procedure, he may still pursue the other procedure. It is for example conceivable that the debtor will benefit from the composition-related set of instruments, which includes a general suspension of payments and the appointment of an administrator.

Section G

Section Two "Court confirmation of a restructuring plan" (new)

The bill for the Continuity of Companies I Act (WCO I) introduces a new Title IV "Outside bankruptcy and suspension of payments" to the DBA. As is also stated in the explanatory memorandum to that bill, the aim is to include the provisions envisaged in the WCO I for the appointment of an intended bankruptcy trustee and the present provisions in two separate Sections in the new Title IV. The present provisions will be included in a new Section 4.2 (Court confirmation of a restructuring plan). The provisions are divided into four paragraphs:

§ 1. General provisions;

§ 2. The offer of and vote on a restructuring plan;

§ 3. Court confirmation of the restructuring plan, and

§ 4. Consequences of the court confirmation of the restructuring plan.

§ 1. General provisions

Article 369

Article 369 sets out the scope of application of the proposed plan.

Paragraph 1

Paragraph 1 provides that the proposed plan concerns debtors that run a business. As stated in the general part of this memorandum, it has been decided to shape the plan as much as possible as a framework plan. This provides the plan with the flexibility necessary to apply it to a wide range of companies and to effect a restructuring plan that is adapted to the specific circumstances of the case at hand. It is immaterial in what legal form the debtor runs his business, as long as its business activities are profitable but due to an excessive debt burden he nevertheless threatens to become insolvent. One exception is made to this basic principle: the plan does not apply to banks or insurers. This is because banks and insurers have their own bailout plan in the Intervention Act, which has also been set up to prevent bankruptcy. A compulsory restructuring plan could interfere with a bailout plan, and this should be avoided.

Paragraph 2

Article 369(2) makes clear what the term "voting creditors and shareholders" in Articles 371(2), 374(1) and (2)(b), 378(1), 379(2), 380(1), 381(2) and (3)(f), and 382(1) refers to. These are creditors and shareholders whose rights are amended as a result of the restructuring plan and who for this reason are entitled, pursuant to Article 378(2), to vote on the restructuring plan. This provision is crucial because it enables a debtor to offer a restructuring plan to all of his creditors and shareholders, or only to a specific group of creditors or shareholders (Article 370(1)). If Article 369(2) is read in conjunction with the above-mentioned Articles in which the term “voting creditors and shareholders” is used, and if the debtor offers a restricted restructuring plan, he will only have to inform those creditors or shareholders of the plan whose contribution he seeks in the restructuring (Article 378(1)). It will then only be those creditors and shareholders who:

- must be given the opportunity to vote on the restructuring plan (Article 378(2));
- must be able to take note of the report to be prepared by the debtor after the vote (Article 379(2));
- must be notified by the debtor of the court's decision setting the date on which the request for court confirmation will be heard (Article 380(1));
- may object to the court against granting court confirmation of the restructuring plan, provided they have voted against the restructuring plan (Articles 380(3), and 381(3) and (4)), and
- are bound to the restructuring plan once it is confirmed by the court (Article 382(1)).

The fact that the debtor does not have to offer the restructuring plan to all parties involved in the company offers him the possibility to effect a restructuring plan in relative peace and quiet and to prevent negative publicity about his financial troubles.

However, as has also already been stated in the general section of this memorandum, this does not amend the fact that pursuant to the Works Council Act employee participation bodies may have to be informed about and be given the opportunity to advice on the restructuring plan.

<u>Paragraph 3</u>

Paragraph 3 stipulates which court has jurisdiction to make decisions within the context of the new Section 4.2 (Court confirmation of a restructuring plan). This concerns:

- declaring and ending a temporary stay (Article 375);
- settling disputes that arise before the vote on the restructuring plan takes place (Article 376), and
- deciding on the request for court confirmation of the restructuring plan (Article 381).

This jurisdiction has been given to the court that has jurisdiction pursuant to Article 2 DBA to declare the debtor bankrupt.

Paragraphs 4 and 5

Paragraph 4 is included because situations may occur in which the economic interest in a claim rests with a party other than the creditor. If a restructuring plan is agreed providing for deferment or partial waiver of the debt, this other party (the beneficial owner) bears the ensuing financial risk. It is therefore justified to allow the claim's beneficial owner, rather than the legal owner, to vote on the restructuring plan. Paragraph 4 provides that in that instance solely the beneficial owner may vote pursuant to Article 378 and that the rules stipulated in the new Section 4.2 pursuant to which rights are granted to the creditors, will in that event be applicable to the beneficial owner.

Paragraph 4 applies for instance to beneficiaries of issued bonds. According to the Dutch Supreme Court, these beneficiaries must, for reasons of fairness and efficiency, be put on a par with the creditors as referred to in the Dutch DBA. These are already entitled to vote on a restructuring plan in the event of a suspension of payments or bankruptcy. The same is now made possible in the event of a compulsory restructuring plan outside bankruptcy.

Paragraph 5 includes a similar plan for the situation in which the shareholder has transferred the economic interest in a share – i.e. the fruits from the share – to another party (the depository receipt holder), whereas the legal interest in the share – i.e. the controlling rights or the voting right – remain with the shareholder. It is stipulated that where the restructuring plan concerns shares for which depository receipts have been issued, the depository receipt holders – and not the shareholder – will be allowed to vote pursuant to Article 378 and that the new rules of Section 4.2 by which the shareholders are granted rights will then be applicable to the depository receipt holders. Important to note is that pursuant to paragraph 5, second sentence, shareholders are not fully excluded from the application of this Section. This means that Articles 370(3) and 382(2) continue to be applicable to the shareholder. Put briefly, these Articles provide that certain rules concerning the decision-making by the general meeting do not apply to the offer and the implementation of a restructuring plan as regulated in the new Section 4.2. Usufructuaries have an economic interest in shares as well (cf. Article 2:88/197 DCC) and are for that reason treated equally to depository receipt holders.

Paragraph 6

The proposed provisions may also be applied if the debtor's business is run in the form of an association or cooperative, which have members rather than shareholders. In view of this, paragraph 6 provides that what applies to shareholders applies by analogy to the members of an association of cooperative.

Paragraph 7

Typically, contracts of suretyship are concluded as part of funding business activities, whereby a third party guarantees a creditor the principal debtor's compliance with an agreement (Article 7:850 DCC). When granting funds to a private limited liability company ("BV"), for instance, a financer may demand extra security in the event that the BV fails to comply with its repayment obligation, in which instance the director is asked to act as guarantor. If the principal debtor fails to honour the agreement, the creditor may ask the guarantor to do so. This guarantor will subsequently have a claim against the principal debtor for payment of the security (Article 7:866 DCC) and may have recourse against the principal debtor for the amount concerned, pursuant to Article 6:10 DCC. If the creditor becomes involved in a restructuring plan and his right of recourse is amended as a result, he may hold the guarantor liable for that part of his claim that he is required to give up as part of the restructuring plan. If the guarantor was subsequently entitled to recover this amount from the debtor, the debtor's financial problems would not be solved by the restructuring plan. Article 369(7) consequently provides that the provisions of the preceding paragraphs in respect of the creditors are also applicable to guarantors that have a right of recourse and that these rights of recourse may also be made part of the restructuring plan.

Apart from these claims of guarantors, this paragraph also provides for claims from third parties based on other forms of contractual or other security, and claims of fellow debtors against the debtor. The phrase "third parties holding assets to which creditors may assert rights" refers to the situation in which a third party provides security by granting a right of pledge or mortgage on one or more of his assets for the compliance of the obligations of the principal debtor towards a creditor.

Paragraph 8

Paragraph 8 concerns the situation described in Article 371 in which the restructuring plan is initiated by one or more of the debtor's creditors rather than the debtor himself. These creditors may ask the court to appoint an expert for this purpose. If the request is granted, the rules included in the new Section 4.2 whereby obligations are imposed on and rights are granted to the debtor, will be applicable to that expert. In brief, this means that the expert may prepare a proposal for a restructuring plan and subsequently initiate the procedure that may lead to court confirmation of the restructuring plan.

Paragraph 9

According to paragraph 9, the restructuring plan may not amend obligations the debtor has towards his employees under employment contracts. Amending these obligations is governed by the Work and Security Act.

Paragraph 10

Paragraph 10 provides that a debtor may not avail himself of the proposed arrangement if in the three preceding years he has already made a failed attempt at effecting a compulsory restructuring plan. The same applies if an attempt has been made in the three preceding years to effect a restructuring plan in bankruptcy or suspension of payments. The content of this provision corresponds with the revision of Articles 252 and 287a DBA envisaged in Parts E and F. This will prevent a chain of proceedings and a going around in circles and finds common cause with provisions concerning restructuring plans in bankruptcy and suspension of payments, whereby a plan may be offered and voted on only once (Articles 138 and 252 DBA).

§ 2. The offer of and vote on a restructuring plan

Article 370

Article 370 provides when a debtor may offer a restructuring plan and what this restructuring plan should entail. This Article also provides that the rules concerning the decision-making in the general meeting are not applicable in this context.

Paragraph 1

Article 370(1) contains one of the key provisions. It provides that a company that threatens to become insolvent due to an excessive debt burden may offer its creditors and shareholders a restructuring plan that provides for an amendment of their rights. Article 381 contains the second key provision, which is in line with this first one. Pursuant to that provision the court may confirm the restructuring plan provided at least one class of creditors or shareholders has voted in favour of the restructuring plan (Article 380(1)) and no ground for refusal can be invoked (Article 381(1)). The court confirmation of the restructuring plan means that it is binding on all creditors and shareholders taking part in it (Article 382). Therefore, creditors or shareholders that did not vote in favour of the restructuring plan may nonetheless be bound to it.

An “amendment of the rights of the creditors and shareholders” refers, for example, to granting a deferment of payment or to a partial waiver of an outstanding debt. Or a “debt for equity swap” may be provided for, whereby a claim is partially converted into shares in the company.

The restructuring plan may pertain to all creditors and shareholders of the company, or only to “a number of them” – i.e. to one or more classes of creditors and shareholders. A restructuring plan may, for instance, solely be aimed at rescheduling or restructuring debts owed to financers and leave claims of ordinary creditors unaffected. The proposed restructuring plan differs in this respect from a restructuring plan in a suspension of payments or bankruptcy. In the event of bankruptcy, the bankrupt may offer a restructuring plan to his joint creditors (through the bankruptcy trustee) (Article 138 DBA) and in the event of a suspension of payments, the debtor may offer a restructuring plan to “those with claims that the suspension of payments has effect on” (Article 252 DBA). However, if the debtor decides not to offer a restructuring plan to all classes of creditors and shareholders, he should realise that the restructuring plan offered will only get court confirmation if:

- he offers good reasons for his decision to exclude certain creditors or shareholders from the restructuring plan and to consequently not ask them to bear part of the costs of the restructuring, or

- the equal or higher-ranking classes of creditors or shareholders have voted by an ample majority in favour of the restructuring plan and consequently also in favour of the decision not to include certain creditors and shareholders in the plan (Article 381(4)(d)).

It is conceivable that the debtor offers a restructuring plan and that the plan is subsequently discussed and negotiated with the creditors and shareholders. This may result in an adjustment of the restructuring plan. The proposed plan offers room to do so, on the understanding that the debtor will eventually have to submit a final restructuring plan to the creditors, and must do so within a reasonable period before the vote takes place. This period may not be shorter than eight days (Article 378(1)).

<u>Paragraph 2</u>

As remarked earlier in connection with Article 369(7), surety agreements are typically concluded as part of the financing of business activities. If the debtor forms part of a group of companies, it may, for instance, be agreed that another company of that group acts as guarantor. If a restructuring plan is agreed under which the creditor releases the principal debtor from paying part of the debt, this will not, in principle, affect the creditor’s claim against the guarantor. The creditor will demand from the guarantor the amount that will not be paid by the debtor. If the guarantor, in turn, was able to recover this amount from the debtor, the restructuring plan would still not offer the debtor a way out of his financial problems. For this reason, Article 369(7) provides that the restructuring plan may also provide for a future recovery action by a guarantor. However, the guarantor’s own solvency may come under threat if his claim against the debtor is considerably reduced as a result of the restructuring plan. Article 370(2) provides for this situation and provides that in this instance the restructuring plan offered by the debtor may also provide for an amendment of the rights that creditors have against guarantors. This means that the restructuring plan may also provide that a creditor’s claim against a guarantor is amended. Apart from the claims against guarantors described above, this provision also pertains to claims based on other forms of contractual or other security provided by third parties and to claims against co-debtors. The phrase “third parties holding goods to which the debtor’s creditors may assert rights” refers to the situation in which a third party binds itself towards a creditor for the compliance by the (principal) debtor with his obligations towards the creditor by granting a right of pledge or mortgage on one or more of his assets.

Article 370(2) allows for the restructuring of a group of companies in one go. Apart from the principal debtor, the companies of the group that act as guarantor or that have provided any other security for the principal debtor may also be included in the restructuring plan. Naturally, such a restructuring plan is only eligible for court confirmation if all procedural requirements related to the offer, the content and the set-up of the restructuring plan during the negotiating phase and the vote on the restructuring plan have been met in respect of the entire group (Articles 370-373, and 376). Court confirmation of the restructuring plan is furthermore only possible in respect of agreements concerning different group companies if the terms for court confirmation set out in Article 381 have been met. Article 370(2) consequently provides that if a restructuring plan is agreed for an entire group, the provisions of the new Section 4.2 regarding the debtor also apply to the group companies that act as guarantor or have provided security for the principal debtor in other ways. To keep the procedure manageable, however, it is provided that the principal debtor must take the lead in the procedure and that he is exclusively authorised to submit the petitions referred to in Articles 375(1), 376(1), 377, and 380(1). These concern petitions to the court for:

- declaring a temporary stay (Article 375(1));
- settling disputes that arise before the vote on the restructuring plan takes place (Article 376(1));
- application of the tailor made provision further to which the court may impose additional measures or make provisions to protect the interests of the creditors or the shareholders (Article 377), and
- deciding on the request for court confirmation of the restructuring plan (Article 381).

<u>Paragraph 3</u>

Paragraph 3 provides for the situation that the debtor is a legal entity. It provides that certain rules regarding the decision-making by the general meeting are not applicable if a restructuring plan is offered pursuant to the new Section 4.2. The same applies when implementing a restructuring plan that is confirmed by the court pursuant to Article 381. If the implementation of the restructuring plan requires a resolution of the general meeting, Article 381(5) provides that the decision granting the court’s confirmation of the restructuring plan may replace it.

The foregoing means in any event that the legal entity's board does not require the confirmation of the general meeting for offering a restructuring plan, unless the plan changes the capital of a public limited liability company. Given that the restructuring plan may also provide for an amendment of the rights of shareholders, such a provision is necessary to prevent that, due to the shareholders' resistance, the board will be completely unable to set the process leading to a restructuring plan in motion. Setting aside the rules concerning the decision-making by the general meeting does not imply, however, that the shareholders can no longer express themselves on the restructuring plan at all. What has changed is how they can do this. If the restructuring plan envisages an amendment of the rights of the shareholders, the shareholders are entitled, pursuant to Article 378(2), to vote on it. If, after the vote, the debtor submits a request to the court for confirmation of the restructuring plan, the shareholders who voted against the restructuring plan may object to the court against the confirmation and may express their views again when the court hears the request (Article 380(3)).

Article 371

Article 371 provides when and how a creditor might initiate a restructuring plan and what the consequences would be for the debtor.

Paragraph 1

Paragraph 1 offers creditors the possibility to ask the court to appoint an expert to draft a proposal for a restructuring plan and subsequently to initiate the procedure that should result in court confirmation of that restructuring plan. The court will only allow the petition if three conditions have been met:

1. there are reasons to fear that the debtor is heading towards bankruptcy;

2. for this reason, the creditor has urged the debtor to offer its creditors and shareholders a restructuring plan to lighten his debt burden, and

3. one week has passed without the debtor having responded to this request, or the debtor has promised to offer a restructuring plan but after one month nothing has been heard from him yet, or he has made a proposal for a restructuring plan but it was so inadequate that the offer cannot be taken seriously.

The first condition has been included because the appointment of an expert will impact the company's normal business activities. First, because the appointment of an expert imposes a duty on the debtor to provide information and cooperate (paragraph 3). Second, because if the restructuring plan is actually effected, it will have to be implemented by the debtor. Thus, there must be compelling reasons to appoint an expert. The second and third condition work out in more detail an important principle of the proposed provisions, i.e. that it is the debtor who must, in principle, take the initiative to effect a restructuring plan. In view of this, the possibility provided in Article 371(1) is mainly included to stimulate the debtor to take action himself.

Paragraph 2

The possibility, offered to creditors in paragraph 1, to ask the district court to appoint an expert to initiate a procedure for effecting a restructuring plan is also available, pursuant to paragraph 2, if the debtor has attempted to effect a restructuring plan, but has failed to do so because none of the classes of creditors or shareholders has voted in favour of the restructuring plan he offered or the district court has withheld its confirmation. This provision is intended, on the one hand, to encourage the debtor; if he decides to initiate a restructuring plan procedure, he is expected to make a serious attempt. On the other hand, the provision serves as a safety net. If a serious attempt of the debtor leads to nothing, the creditors may take action by getting an expert appointed who may draw up a modified restructuring plan that does get accepted.

Paragraphs 3 and 4

If the district court decides to appoint an expert, the debtor must provide the expert with all information and give him every cooperation the expert needs to accomplish his task (paragraph 3). To avoid unwanted exposure, the expert may only share the information he receives with third parties where this is necessary as part of bringing about the restructuring plan (paragraph 4).

Paragraphs 5 and 6

Paragraph 5 provides that the district court will hear a creditor's petition for the appointment of an expert in chambers. This is in line with the practice adopted for hearing a bankruptcy petition. Pursuant to Article 4(1) DBA, hearing a bankruptcy petition in chambers is the rule, because the interests of the debtor usually oppose a public hearing. This is even more compelling when hearing a petition for the appointment of an expert, since this request is aimed at initiating a restructuring plan to prevent the debtor from going bankrupt. If the petition is heard in public, it may create negative publicity about the debtor's financial problems, which may considerably reduce the chances of a successful rescue of the company.

Before deciding on the petition, the district court will grant the debtor and the creditor who submitted the petition the opportunity to express their views. As stated earlier, the appointment of an expert and the related initiating of a procedure aimed at effecting a restructuring plan will have a considerable impact on the debtor's business activities. Because of this, the debtor should be given the opportunity to express his view on the petition and to put forward any objections he may have to it. It is furthermore essential that the creditor who submits the petition can respond to those views and objections. This will provide the district court with a comprehensive view of the situation, which it needs to make a balanced decision on the petition.

Paragraph 6 provides that the decision of the district court is not open to appeal.

When submitting a petition for the appointment of an expert, the creditor must be represented by legal counsel (Article 5 DBA). The creditor will also owe a court fee. He will be charged the rate that applies to claims for an unspecified amount. This is presently € 287 for natural persons and € 618 for legal entities (see the schedule to the Court Fees (Civil Cases) Act).

Article 372

Article 372 offers to the debtor who threatens to become insolvent, and for that reason offers his creditors and shareholders a restructuring plan, the possibility to restructure future commitments under existing agreements, in addition to his existing debts. These may include, for instance, a lease agreement for business premises, or ongoing supply agreements. Article 372 applies to both fixed-term and open-ended agreements.

This Article additionally provides that “ipso facto clauses”, i.e. contract terms that automatically attach contractual consequences to initiating insolvency proceedings or other insolvency-related events in which the debtor is involved, remain without effect.

<u>Paragraph 1</u>

Paragraph 1 offers the debtor the possibility to submit a proposal to the counterparty of an existing agreement to amend that agreement. If the counterparty refuses this, the debtor may terminate the agreement. The agreement must be terminated as from the date on which such agreements usually end according to local custom. The notice period to be observed is the agreed notice period or the usual notice period, with a maximum of three months. This is in line with Article 39 DBA concerning the notice period to be observed for lease agreements in the event of bankruptcy.

Paragraph 1 does not provide further requirements as to how the agreement must be terminated. Where specific statutory provisions do require this, these will have to be complied with. A lease agreement for business premises must for example be terminated by registered letter or bailiff’s writ (Article 7:293(2), DCC).

<u>Paragraph 2</u>

Paragraph 2 provides that after the agreement has been amended or terminated, the counterparty is entitled to compensation. The amount of compensation is determined in accordance with Section 10 of Title 1 of Book 6 of the Dutch Civil Code. This paragraph also provides that the restructuring plan offered by the debtor pursuant to Article 370(1) may also provide for an adjustment of the compensation amount.

<u>Paragraph 3</u>

Any provision in an agreement that the agreement will automatically end if a restructuring plan is offered, or that the counterparty is entitled to terminate the agreement in that event, or that any right or obligation under that agreement is automatically amended, or that gives the counterparty the right to effect such an amendment, is set aside by paragraph 3. This provision should be interpreted broadly; it also pertains to clauses having a comparable effect, such as “change of control” clauses. Any clause that would make it impossible to offer a restructuring plan providing for a debt for equity swap, where new shareholders join the company, will also be set aside.

It is necessary to include this provision in order to prevent a creditor from unduly invoking such a clause to block the restructuring, or to demand full payment of his claims at the expense of the other stakeholders.

Article 373

It was previously remarked that the restructuring plan is only eligible for court confirmation if it includes a restructuring proposal that is reasonable towards the creditors and shareholders concerned. This means in any event that the proposal must aim at a fair distribution of the costs involved in the restructuring, and of the going concern value that may be realised by the restructuring plan, among the creditors and shareholders. The criteria applied to determine this are derived from rules in the American Chapter 11 procedure, e.g. the “absolute priority rule” (Article 381(4)). What is fair depends on the position of the creditor or shareholder concerned. In view of this, Article 373 provides that if a restructuring plan pertains to creditors and shareholders that are in different positions, the creditors and shareholders must be divided into separate classes, whereby each class should be allocated the rights of those creditors or shareholders (Article 374), and each class must vote on the restructuring plan separately (Article 378(3)).

According to Article 373, a division into classes is required if the 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”. In other words, where the positions of the various creditors or shareholders cannot be compared. Whether this is the case depends on:

- the rights the creditors and shareholders concerned have at the time when the restructuring plan is offered;
- the rights they will acquire under the restructuring plan, and
- their interests, specifically those at the time of effectuating the restructuring plan.

In any event, where creditors or shareholders would rank differently in bankruptcy proceedings, they will have to be divided into separate classes (cf. Title 10 of Book 3 DCC and Article 57(1) DBA). There may, for instance, be separate classes for creditors holding a right of pledge or mortgage, creditors having a retention of title, or unsecured creditors. It is evident that the rights and interests of these creditors will be different from each other and that their positions consequently differ.

A creditor may be placed in separate classes, for instance because part of his claim is secured by a right of pledge or mortgage, while another part is unsecured. For the part of his claim secured by a right of pledge or mortgage, this creditor will have to be placed in the class of secured creditors, and for the other part in the class of unsecured creditors.

The debtor may divide a class into subclasses and may make each of these sub-classes a separate offer; one class may even be allocated more than another class. In the latter event, the restructuring plan will only be confirmed by the court:

- if the debtor provides a reasonable ground for the distinction he makes, or
- the class that is allocated fewer votes agrees with an ample majority with the restructuring plan, and therefore with the decision to make another class a better offer (Article 381(4)(c)).

Article 374

Article 374 provides which information must be included in the restructuring plan and which information is to be submitted at the same time. This provision serves in particular to ensure that the creditors and shareholders obtain the information they need in order to effectively use their voting right under Article 378.

<u>Paragraphs 1 and 2</u>

Paragraph 1 first of all comprises the principle that the restructuring plan must comprise all the information the voting creditors and shareholders require for an informed opinion on the restructuring plan before the actual vote takes place. Paragraphs 1 and 2 furthermore prescribe which basic information should in any event be included in, or attached to, the restructuring plan. This list is not exhaustive. Additional information will almost invariably need to be provided in order to meet this principle.

The list with basic information should enable the creditors and shareholders:

- to have a clear picture of what the consequences of the restructuring plan will be for them (paragraph 1(b) and (d));
- to estimate whether the conclusion of the restructuring plan is necessary and adequate to avert an imminent bankruptcy, and whether the restructuring plan is fair (paragraph 1(a) and (c) and paragraph 2); and
- to learn how they can make further inquiries (e) and how and when they can cast their vote on the restructuring plan (f).

With regard to the information mentioned in paragraph 1(d), the following should also be noted. The restructuring plan may provide for an allocation of rights to the creditors and shareholders. This can be the right to a payment in money but also payment in a different form, such as in bonds or shares. Paragraph 1(d) prescribes that in that event the creditors must be informed about the time of allocation of the rights. This means that the debtor will have to announce when the money will be paid out, or when the bonds or shares will be issued.

In the event it turns out to be necessary to extend the list with basic information in the future or to set further rules on how the information is to be provided, paragraph 3 provides for the possibility to set further rules on this by an order in council.

Article 375

Article 375 offers the debtor the possibility to ask the court for a temporary stay towards all or a number of creditors. During this period of up to two months, which may be extended once by another two months, the creditors concerned may only exercise their right of recourse to assets that form part of the debtor's assets, or demand the return of assets that are in the debtor's possession, with the authorisation of the district court. This also implies, for example, that a bank is not allowed to set off the payments of the debtor made into his bank account against the outstanding debt (i.e. the debit balance on the account) without the court's permission. Section 2.1 DBA already has such a plan for the suspension of payments (Article 421a ff. DBA). For reasons of consistency and practical feasibility, this arrangement has been closely matched.

Like Article 3d, which allows the hearing of a bankruptcy petition to be stayed, this provision falls within the category of additional measures aimed at giving the debtor the opportunity to conclude a restructuring plan and avoiding that the creditors who do not wish to cooperate in a restructuring at all, can unduly delay or manipulate the conclusion of a restructuring plan. The conditions under which these measures can be applied and the considerations that play a role in this context, are similar. For a further explanation to this Article, reference is therefore made to the explanation to Article 3d.

Article 376

Article 376 offers the debtor the possibility to bring before the court any disputes arising during the stage prior to the vote on the restructuring plan. As noted before, an important starting point of the plan is that, in principle, the involvement of the court is limited until the moment at which a request for court confirmation is submitted. However, if there is uncertainty about the question whether there exists a ground for refusal which, even if all classes of creditors or shareholders were to agree to the restructuring plan, would prejudice the court's confirmation of the restructuring plan, it is important from the viewpoint of promoting "deal certainty" that this can be removed as quickly as possible. At the same time, it must be avoided that the process leading up to conclusion of the restructuring plan is unduly detained. Also for this reason, this possibility to involve the court earlier on in the process is not open to the creditors and shareholders. This is to avoid that creditors or shareholders who under no circumstances wish to cooperate in a restructuring, can prevent, delay or manipulate the coming about of a restructuring plan on improper grounds.

Paragraphs 1, 3 and 4

Paragraph 1 comprises a list of the points of dispute the debtor can bring before the court. These points of dispute can be summarised in the main question whether the restructuring plan at hand could be eligible for court confirmation or whether one or more of the grounds for refusal referred to in Article 381(3) may be involved. At this stage, the court cannot yet be asked to conduct a test against the grounds for refusal referred to in Article 381(4). This is because it can only be established after the vote whether these grounds apply, as any applicability of these grounds depends on whether one or more classes have voted against the restructuring plan.

The following is also noted with regard to (a), (b) and (c). A point of dispute in respect of the debtor's power to offer a restructuring plan pursuant to Section 4.2 mainly pertains to the question whether the debtor actually finds himself in a situation where, because of too heavy a debt burden, he threatens to become insolvent (subparagraph a). As noted before, this is one of the basic conditions that needs to be met in order for the court to confirm the restructuring plan. When asked to do so, the court will therefore have to conduct an insolvency test.

Disputes on the contents of the information included in the restructuring plan or in the documents attached to it (subparagraph b) may contain, among other things:

- a party contesting the valuations which the debtor has included in his restructuring plan in accordance with Article 374(1)(c) and which form the basis for the restructuring proposals included in the restructuring plan; or
- a dispute about the level of the claim from a creditor or the value of the right of a shareholder as stated by the debtor, in accordance with Article 374(2)(b), in the list to be submitted together with the restructuring plan and which is decisive for the creditor's or shareholder's admission to the vote (c)).

Pursuant to paragraph 3, the court could ask an independent expert to conduct an investigation into this information and submit a report on it. Based on this report, the court can decide on the reliability of the information provided by the debtors. If the dispute concerns the question whether certain information is lacking, the court, prior to deciding, may allow the debtor a period within which he can supplement this information (paragraph 4).

Paragraph 2

Pursuant to Article 374(2)(b) the debtor must submit a list with the restructuring plan stating the names of all creditors and shareholders and the amount of their claim or the nominal amount of their share. It is possible that a co-creditor or creditor or the shareholder himself will subsequently call this information into question, i.e. that he challenges the level or even the very existence of the claim or the right. As this information is decisive for admission of the creditor or shareholder to the vote and eventually for the result of the vote, it is important that a decision is made on this before the vote. Article 376(2) therefore provides that if the debtor brings such a dispute before the court, the court will decide whether, and up to what amount this creditor or shareholder will be admitted to the vote on the restructuring plan. The decision whether or not to (partially) allow a creditor or shareholder only pertains to the admission to the vote. The decision solely has a procedural effect and does not have any effect on the claim or the right being established. Separate proceedings need to be conducted in order to get a definitive answer on this. If it turns out later in these proceedings that no claim existed or that this claim was lower or higher than the amount that was assumed when the restructuring plan was concluded, application of Article 147 DBA results in this no longer having any influence on the outcome of the vote. If a creditor or shareholder is not admitted to the vote, he cannot oppose a court confirmation of the restructuring plan at a later stage (Article 381(3)). Because the creditor or shareholder cannot vote on the restructuring plan, consequently it cannot be declared binding on them either (Article 382(1)). Section 2.1 DBA already has these provisions for the suspension of payment (Article 267 DBA). For the sake of consistency and practical feasibility, these provisions have been closely matched.

Paragraphs 5 and 6

Paragraph 5 provides that the district court will hear a request from a debtor to decide on a point of dispute as referred to in paragraph 1 in chambers. Thus the practice concerning the hearing of the bankruptcy petition or the filing thereof has been mirrored. Pursuant to Article 4(1) DBA, a hearing in chambers is the rule in case of a bankruptcy petition or filing, because the interest of the debtor will generally oppose a public session. This is even more compelling when hearing a request as referred to in this Article, since this request is aimed at facilitating the conclusion of a restructuring plan in order to prevent the debtor from going bankrupt. If the request is heard in public, this could directly lead to negative publicity on the financial problems arisen and would considerably reduce a successful rescue of the company. Before the district court takes a decision in the context of paragraphs 1 and 2, it must allow the debtor and the creditor or shareholder involved in the dispute the opportunity to be heard and to bring forward their viewpoints. This way the district court will get a full picture of the situation. It will need this in order to be able to take a proper decision.

Paragraph 6 provides that the decision of the district court is not open to appeal. To submit a request as referred to in paragraph 1, the debtor must be represented by legal counsel (Article 5 DBA). The creditor will also owe a court fee and will be charged the rate for claims of an unspecified amount. This fee is presently € 287 for natural persons and € 618 for legal entities (see the schedule to the Court Fees (Civil Cases) Act).

Article 377

Article 377 offers the district court the possibility to take measures or make further provisions to protect the interests of the creditors and shareholders involved. The court may do this at the request of the debtor, but also on its own initiative. Naturally, this will only be relevant once the district court is involved during any phase in the process of concluding the restructuring plan. This is in any event the case if the debtor requests the district court:

- to stay the hearing of a bankruptcy petition (Article 3d);
- to pronounce a temporary stay (Article 375), or
- to decide on a dispute that arose during the phase preceding the vote (Article 376).

In these cases, the creditors or shareholders involved may also ask the district court to take measures or make further provisions.

As for the measures to be taken, one could think of, for example, setting the condition that the restructuring plan needs to be voted on within a certain period of time. Or that the district court provides that the debtor is to report periodically on the progress of the procedure, or that an independent expert is appointed to monitor the procedure.

The power to impose make further provisions offers the district court the possibility to set aside the provisions applicable to the conclusion of a compulsory restructuring plan or to tailor them to a specific situation. Section 2.1 of the DBA already has these provisions for the suspension of payment (Article 225 DBA). For the sake of consistency and practical feasibility, those provisions have been closely mirrored. As for Article 225 DBA, the Dutch Supreme Court has already ruled that a decision of the district court in which it sets a “voting record date” in order to subsequently determine who can be regarded as “beneficial holders” of the bonds and therefore be admitted to the vote on a restructuring plan offered, is to be regarded as a decision within the meaning of Article 225 DBA.10

Article 378

Article 378 provides when the debtor must present his final restructuring plan to the creditors and shareholders, provides rules for voting on the restructuring plan and about who are eligible to take part in the vote, and prescribes how the result of the vote is determined.

Paragraphs 1 and 2

Paragraph 1 provides that the final restructuring plan must be presented to the voting creditors and shareholders during a reasonable period, which should be at least eight days before the vote takes place. As explicitly provided by this provision, the intention is for the voting creditors and shareholders to be given sufficient opportunity ahead of the vote to “be able to form an informed opinion” on the restructuring plan. What is relevant here is that the creditors and shareholders shall have sufficient opportunity to examine the final draft restructuring plan. It will depend on the specific circumstances how much time exactly will be needed. It is possible that more time is needed than the period of eight days mentioned.

The debtor himself may determine in what way he will inform the creditors and shareholders. The debtor may opt to send the restructuring plan and the accompanying documents by post or electronically. He may also place the restructuring plan and the accompanying documents on a website accessible to the creditors and shareholders and send the creditors and shareholders a notification of this.

Paragraph 2 provides which creditors and shareholders are entitled to vote on the restructuring plan. These are the creditors and shareholders whose rights are amended under the restructuring plan. For example, creditors who are asked to agree to a suspension of payment or a partial remission of the outstanding claims and creditors who are asked to make an additional investment in the company or to cooperate in the issue of new shares in order to thus attract new investors or to realise a debt for equity swap. Creditors and shareholders whose rights are not amended, are not entitled to vote, therefore the final restructuring plan does not have to be presented to them.

Paragraph 3

If the restructuring plan provides for a class composition, paragraph 3 prescribes that each class requires a separate vote on the restructuring plan to be held. Furthermore, the debtor shall decide when and how the vote will take place. The vote can take place in writing. The debtor may also decide to convene a meeting, whether or not using electronic means of communication. The only thing that is relevant in this context is that the debtor adheres to what he has included in the restructuring plan on this – in accordance with Article 374(1)(f).

Paragraphs 4 and 5

Paragraphs 4 and 5 prescribe how the result of the vote is determined. First of all, it is important that only the votes actually cast are considered. In particular in the event of minor claims or rights of limited value, creditors or shareholders may be found not to make the effort to take part in the vote. If the votes that have not been cast were also to be considered, this could result in a restructuring plan that would not be eligible for court confirmation due to the mere absence of creditors or shareholders. To avoid this, it is prescribed that in determining the result of the vote, only the votes actually cast are taken into account. Naturally, it is essential in this context that paragraph 1 has been properly applied so that the creditors and shareholders entitled to vote are aware of the restructuring plan and of the fact that they are entitled to vote on this plan, and when exactly they can do so. In hearing the request for a court confirmation, the district court will on its own initiative assess whether this has been the case. If the debtor failed to do so, the district court will refuse its confirmation, unless the creditors and shareholders who were not properly informed, declare that they accept the restructuring plan (Article 381(2)).

Furthermore, in establishing the result of the vote it is not so much relevant how many individual creditors or shareholders voted in favour of the restructuring plan, but rather which financial interest those in favour of the plan represent. Pursuant to paragraph 4, acceptance of a restructuring plan by a class of creditors requires that the creditors voting in favour of the restructuring plan represent at least two thirds of the total amount in claims belonging to the particular class. Paragraph 5 contains a similar provision that starts from two thirds of the number of shareholder votes cast.

Article 379

Article 379 prescribes that after the vote the debtor must prepare a report and allow the creditors and shareholders involved forthwith to take note of this report.

<u>Paragraph 1</u>

Paragraph 1 provides that, in the report, the debtor must not only mention the result of the vote, but also mention the creditors and shareholders who voted and whether they voted in favour or against the restructuring plan. This information allows the creditors and shareholders to check the result of the vote as phrased by the debtor. If the debtor, following the vote, submits a request for court confirmation of the restructuring plan, the creditors and shareholders who voted against the restructuring plan can moreover assess whether they consider it useful to oppose this. Should they decide to submit an actual request for refusal, this information can be used to substantiate this request.

<u>Paragraph 2</u>

When the debtor submits a request for confirmation, paragraph 2 prescribes that he must file the report with the office of the clerk of the court that will hear the request. Following the filing, the voting creditors and shareholders can inspect the report for a period of eight days free of charge. It is in the debtor’s interest to file the report as soon as possible, as the hearing at which the request for court confirmation is heard, will be held within eight to fourteen days after the report has been filed for inspection (Article 380(2)).

§ 3. The court confirmation of the restructuring plan

Article 380

Article 380 provides when it is possible to file a request for court confirmation of the restructuring plan and the period within which the district court hears this request. This Article also provides in which cases creditors and shareholders can still object to the court confirmation, and how they should do this.

Paragraph 1 provides that filing a petition for court confirmation of the restructuring plan is possible if there is at least one class that has agreed to the restructuring plan. If the debtor actually proceeds to do this, the district court will as soon as possible make a decision as to when the hearing at which the petition will be heard, will take place. Pursuant to paragraph 2 the hearing shall at any rate be scheduled eight to fourteen days after the debtor has filed the report on the result of the vote.

Paragraph 3 provides that petitions for refusing court confirmation may be filed to the district court until the day of the hearing. A restriction to such petition is however that:

- only creditors and shareholders who voted against the restructuring plan can file such petition; and
- they cannot invoke any ground for refusal referred to in Article 381(3) if they were already aware of the existence of this ground but failed to promptly object to the debtor against this.

The creditors and shareholders are thus encouraged to timely – i.e. before the vote takes place - report any crucial objections against the restructuring plan. This offers the debtor the opportunity – whether or not by referring to the court (Article 376(1)) – to timely come up with a solution. If necessary, the debtor can still adjust the restructuring plan and remove any obstacles to the court confirmation. This will prevent that a process which appears to have little chance of success is continued with all the inherent and unnecessary costs involved.

In view of this possibility to object to the court confirmation, it is essential that the voting creditors and shareholders are informed accurately and promptly of the hearing at which the petition for court confirmation will be heard. The debtor will need to ensure that this information will reach the creditors and shareholders. Paragraph 2 provides that he must inform the voting creditors and shareholders in writing of the decision of the district court. In hearing the petition for court confirmation, the district court will assess on its own initiative whether this has actually taken place. If the debtor failed to do so, the district court will withhold its confirmation unless the creditors and shareholders who were not properly informed declare that they accept the restructuring plan (Article 381(2)).

To submit a request as referred to in paragraphs 1 and 3, the debtor and the creditor or shareholder, respectively, must be represented by legal counsel (Article 5 DBA). Furthermore, a court fee will be due. They will be charged the rate for claims of an unspecified amount. At present, this is € 287 for natural persons and € 618 for legal persons (see the annex to the Court Fees (Civil Cases) Act).

Article 381

Article 381 provides when the district court can proceed to confirm the restructuring plan or when it will have to refuse a petition to that effect.

Paragraph 1

Paragraph 1 provides that the district court must decide on the petition for court confirmation as soon as possible, and that it will honour this petition unless one of the grounds for refusal referred to in paragraph 2 up to and including paragraph 4 is involved.

Paragraph 2

Paragraph 2 prescribes that the district court will at all times assess on its own initiative whether all creditors or shareholders to which the restructuring plan pertains:

- have been properly informed of the restructuring plan,
- have had the opportunity to cast their vote on the restructuring plan; and
- have been notified of the decision of the district court in which it scheduled the hearing at which the petition for court confirmation would be heard.

If the debtor failed to meet one or more of these obligations to notify the voting creditors and shareholders, the district court will have to withhold its confirmation, unless the creditors and shareholders who have not been properly informed, declare that they accept the restructuring plan. If the debtor has met the obligations to notify referred to and nobody else has objected to the court confirmation, the district court will honour the petition for court confirmation. The court will only conduct a more profound assessment of the restructuring plan if one or more creditors or shareholders voting against the restructuring plan have objected to the court confirmation based on one or more statutory grounds for refusal mentioned in paragraphs 3 or 4.

Paragraph 3

Paragraph 3 comprises the general grounds for refusal; i.e. the grounds that, if invoked successfully, are to result in the district court refusing a request for confirmation, even if all classes of creditors and shareholders have agreed to the restructuring plan. The district court will refuse its confirmation of the restructuring plan if:

- the procedural provisions concerning the offer, the contents and the set-up of the restructuring plan and the voting procedure have not been applied correctly ((a) up to and including (c));

- the restructuring plan is unfair because there are creditors or shareholders who based on the restructuring plan would essentially end up in a worse position than in a bankruptcy (paragraph 3(d)), or

- one of the grounds for refusal apply that already apply to restructuring plans during suspension of payments or bankruptcy pursuant to Articles 153(2), and 272(2), ((e) up to and including (h)).

It has already been noted in the explanation to Article 380(3) that only creditors and shareholders who voted against the restructuring plan can invoke these grounds for refusal and that this is no longer possible if they were already aware of the possible existence of one or more of these grounds, but never raised them with the debtor at an earlier stage (Article 380(3)).

The following is noted with regard to (d). The proposed provisions offer a company the possibility to ask the district court for confirmation of a restructuring plan between the company and its creditors and shareholders concerning the rescheduling and restructuring of debts in order to avoid a bankruptcy. An important condition in this context is that the court confirmation, as a result of which also creditors and shareholders voting against the restructuring plan are bound to it, must be justified given the circumstances and that this means inter alia that the restructuring plan must be fair. Therefore, the creditors or shareholders, as a result of the restructuring plan, should not involuntarily end up in a worse position than in the event of bankruptcy. When in each class an ample majority of the voting creditors and shareholders has voted in favour of the restructuring plan, the court must in principle be in a position to assume that the restructuring plan meets this condition. This does not amend the fact that there may still be individual creditors or shareholders who think differently. The fact that they represent a minority opinion, justifies the fact that the court will assess this objection prima facie.

<u>Paragraph 4</u>

Paragraph 4 comprises the additional grounds for refusal. These grounds are only considered in the event that not all classes agreed to the restructuring plan. Based on these grounds the district court will also need to withhold its confirmation to the restructuring plan if it were to result in the costs of the restructuring or the value to be realised by the restructuring plan (i.e. the going-concern value of the company in question) not being distributed fairly among the classes of creditors and shareholders. The criteria applied to determine whether this is the case, are partly inspired by several rules from the US Chapter 11 procedure, namely:

- the “absolute priority rule”, as phrased in (a);

- the “not more than 100%-rule”, as phrased in (b); and
- the “no unfair discrimination-test”, as phrased in (c) and (d).

In addition, it follows from (e) that creditors who in a bankruptcy could lay claim to payment in cash, can only be forced to accept payment under the restructuring plan in another form if an ample majority of the class to which they belong has consented to this. This mainly concerns providers of funding who have a security interest. If the restructuring plan provides for a debt for equity swap whereby the financing provided or part thereof is converted into equity, this basically means that the provider of funding is forced to continue to finance the company. In the case of bankruptcy, this financing would end and the financier would be able to convert the security he obtained into cash. With these proceeds, he would be able to consider entering into another, more attractive financing agreement. If in the class of providers of funding an ample majority has voted in favour of the restructuring plan, the court may assume that the debt for equity swap is a fair proposal in the given circumstances.

<u>Paragraph 5</u>

For the explanation to paragraph 5 reference is made to what has been noted in the context of Article 370(3).

<u>Paragraph 6</u>

Paragraph 6 provides that no Supreme Court or other appeal is possible against the decision of the court. This is justified because the restructuring plan comes about in the urgent situation of an imminent bankruptcy declaration (Article 370(1)). To avert a bankruptcy, the restructuring plan will have to be implemented soon after the court confirmation has been obtained. This does not alter the fact that questions concerning the correct application of the proposed provisions could still end up before the Supreme Court in a different way. For example, it is possible that the district court in the context of the hearing of a petition for court confirmation, asks the Supreme Court to render a decision on the way in which a provision should be applied (Article 392 ff. of the Dutch Code of Civil Procedure). Another possibility is Supreme Court appeal by the Public Prosecutor in the interest of the law (Article 78(1) lid 1 Judiciary (Organisation) Act).

<u>§ 3. Consequences of the court confirmation of the restructuring plan</u>

Articles 382, 383 and 384

The Articles 382 up to and including 384 set out the consequences of the court confirmation of the restructuring plan. Article 382(1) provides that, following the court confirmation, the restructuring plan is binding on all voting creditors and shareholders. This implies that the creditors and shareholders who voted against the restructuring plan are also bound by it. Which creditors and shareholders exactly this involves, is easy to infer from the list which must be submitted with the restructuring plan pursuant to Article 374(2)(b). For the explanation to Article 382(2) reference is made to what has been noted in the context of Article 370(3).

Article 383 provides that the district court's confirmation of a restructuring plan constitutes a title to enforcement. This means that, when the debtor fails to (timely) fulfil his obligations under the restructuring plan, the creditors who have claims against him may directly invoke the decision in which the court confirmation was given, and enforce compliance.

Furthermore, pursuant to Article 384, if the debtor fails to (timely) fulfil the restructuring plan, he is obliged to compensate the damage suffered by the creditors and shareholders as a result. No prior notice of default is required. Possibly the creditors or the shareholders also have a right to dissolve the restructuring plan in that case. However, this right can be excluded in the restructuring plan. This would appear logical if the restructuring plan contains elements that are difficult to reverse, such as a debt for equity swap whereby the claims of certain creditors have meanwhile been converted into shares in the company.

The Minister of Security and Justice,