

Amendment to the Bankruptcy Act in connection with the implementation of the option to declare a composition for restructuring debts made outside bankruptcy universally binding (Continuity of Enterprises Act II)

LEGISLATIVE BILL

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

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

Whereas We have considered that it is desirable for the Bankruptcy Act to include a regulation on the basis of which the court will be able to declare a restructuring of debts composition, supported by the majority of creditors of a business, binding for all creditors of that business, as well as for its shareholders.

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

Article 1

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

A

Article 3c is added after article 3b, which reads:

Article 3c Stay of the processing of the petition for bankruptcy in the event of offering an extrajudicial composition

1. If a petition for bankruptcy concerns a legal entity or an individual who, whether or not in collaboration with one or more other individuals or legal entities, practises an independent profession or runs a business, the court may stay the processing of the petition for bankruptcy at the request of the debtor or one or more of its creditors for a reasonable period, if they have offered a composition within the meaning of article 368, unless there is good reason to believe that the composition will be dismissed.
2. If a petition for bankruptcy and a request as referred to in article 373:1 and 2 are pending at the same time, the latter request will be processed first and the court will stay the processing of the petition for bankruptcy, unless there is good reason to believe that the request as referred to in article 373:1 and 2 will be dismissed.
3. The stay referred to in article 373:1 and 2 will not be ordered if there are compelling reasons for not doing so.
4. In the event of a stay as referred to in article 373:1 and 2, the court may make such arrangements as it deems necessary in order to protect the interests of the debtor or the creditors.
5. As soon as the composition is dismissed or the expectation that the composition will be accepted is no longer justified, the debtor or creditor who offered the composition will notify the court accordingly without delay.
6. The court will immediately lift the stay referred to in paragraphs 1 and 2 as soon as:
 - a. it has been requested to do so by a creditor who is entitled to a claim that has become due and payable and has remained unpaid during the stay period;

- b. it has received the notification referred to in the previous paragraph from the debtor or the creditor who offered the composition;
- c. it has denied a request as referred to in article 373:1 and 2.

B

In article 5:1, 'and 363:1' is replaced by: 363:1, 373:1 and 2.

C

An article is inserted after article 42, which reads:

Article 42a

1. Legal acts to the effect of providing security or providing a guarantee for debts that arise between the offering of a composition as referred to in article 368:1 and the moment the vote about the composition as referred to in article 372:1 is closed, or to the effect of extending existing security to also cover such debts cannot be annulled pursuant to the previous article.
2. If a request is made as referred to in article 373:1 and 2, the provisions in the previous paragraph apply accordingly to the providing of security or providing a guarantee for debts that arise between the moment the vote about the composition is closed and the moment on which the decision about that request becomes irrevocable, as well as to legal acts to the effect of extending existing security to also cover such debts.

D

Article 47 will read as follows:

Article 47

1. The debtor's payment of due and payable debts can be annulled only when it is demonstrated:
 - a. that the party receiving the payment knew that the petition for bankruptcy of the debtor had already been filed or
 - b. that the payment was the result of consultation between the debtor and the creditor, with the aim of favouring the latter over other creditors by means of that payment.
2. If a composition is offered as referred to in article 368:1, payment of due and payable debts which arose after submission of a petition for bankruptcy cannot be annulled by virtue of the provisions in the previous paragraph under a.

E

Three paragraphs are inserted after article 54, which read:

3. The provisions in paragraph 1 do not apply if and insofar as a bank as referred to in article 212g(a), proceeds to set off debts to the creditor acquired by it pursuant to payment into the creditor's account at that bank between:

- a. the moment of offering a composition as referred to in article 368:1 and the moment at which the vote about the composition as referred to in article 372 is closed, or:
 - b. the moment of the written request by the creditor to the debtor to offer a composition as referred to in article 368:1 and the moment at which the vote about the composition as referred to in article 372 is closed.
4. If a request is made as referred to in article 373:1 and 2, the provisions in the previous paragraph apply accordingly if and insofar as the bank as referred to in article 212g(a), wishes to invoke a set-off of debts to the creditor that have been acquired pursuant to payment into the creditor's bank account at that bank between the moment at which the vote about the composition is closed and the moment at which the decision about that request becomes irrevocable.
 5. In the event of stay of the processing of the petition for bankruptcy pursuant to article 3c:1 and 2, the provisions in paragraph 1 apply accordingly.

F

An article is inserted after article 329, which reads:

Article 329a

The provisions in this chapter do not apply if the debtor has offered his creditors a composition as referred to in article 368:1.

G

A chapter entitled "Chapter 2: Declaring a composition for restructuring of debts universally binding" is inserted after article 367, which part reads as follows:

CHAPTER 2 DECLARING A COMPOSITION FOR RESTRUCTURING OF DEBTS UNIVERSALLY BINDING

Article 368 Offering an extrajudicial composition

1. A legal entity or an individual who, whether or not in collaboration with one or more other individuals or legal entities, practises an independent profession or runs a business, is, in order to restructure his debts, entitled to offer his creditors or a number of them, as well as his shareholders or a number of them, a composition that provides for amending their rights.
2. A creditor who anticipates that his debtor will not be able to continue to pay his due and payable debts may request a debtor as referred to in paragraph 1 in writing to proceed to offer a composition as referred to in that paragraph. If subsequently such a period has lapsed as to give the debtor a reasonable chance to offer a composition, but he has failed to do so, the creditor can offer a composition of its own volition, subject to immediate notification to the debtor.
3. Unless stipulated otherwise by the composition, the rights which creditors can exercise towards sureties, co-debtors and guarantors of the debtor remain unchanged.
4. If the debtor who offers the composition is a public limited company, section 2:107a of the Dutch Civil Code does not apply to the decision of the board to offer a composition. Any rule, either under the articles of association or agreed upon between shareholders and the legal entity, to the effect that

that offering a composition or the intention to do so requires the consent of the general meeting, is void. The provisions in the last sentence apply accordingly if the debtor is an association, a European company or a private limited company.

5. From the moment at which the composition as referred to in article 370:1 is offered, articles 38 and 107 and Titles 4.4 and 5.3 of Book 2 of the Dutch Civil Code, as well as article 5:25ka of the Financial Markets Supervision Act and any rule either under the articles of association or agreed upon between shareholders and the legal entity with regard to resolutions passed by the general meeting do not apply to the composition. Insofar as the execution of the composition requires a resolution from the general meeting, it is substituted by the final decision to declare the composition universally binding.
6. If the debtor is a cooperative or an association that runs a business, the provisions in this chapter with regard to shareholders apply accordingly to the members.
7. The provisions in this title with regard to shareholders apply accordingly to holders of depositary receipts and other persons directly or indirectly entitled to the capital of the legal entity.
8. The provisions in this part do not apply to a bank as referred to in article 212g(a).
9. The provisions in this part do not apply to obligations of the debtor arising out of employment contracts within the meaning of section 7:610 of the Dutch Civil Code existing at the time the composition was offered.

Article 369 Classification of creditors and shareholders into classes and voting rights

1. The composition may provide that creditors and shareholders are each placed in separate classes.
2. Creditors with claims and shareholders with rights that should reasonably be regarded as similar will be placed in the same classes.
3. Creditors and shareholders to whom the composition is offered and whose rights are amended pursuant to the composition are entitled to vote.
4. If the economic interest in claim a share fully or predominantly lies with a party other than the person legally entitled thereto, he is, to the exclusion of the person legally entitled, entitled to vote on the composition at his own discretion for that part of the claim he is entitled to.

Article 370 Proposal for the composition

1. At least eight days before the vote, the debtor or the creditor referred to in article 368:2 presents the proposal for the composition to the creditors and shareholders whose rights are amended pursuant to the composition, or he notifies the creditors and shareholders in question of how they can take cognisance of the proposal for the composition.
2. The proposal for the composition does in any case include:
 - a. the composition, a substantiation thereof and a description of the financial consequences per class of creditors and shareholders whose rights are amended , as well as the way in which it contributes to preventing bankruptcy;
 - b. the selection of classes and the criteria on the basis of which it was made;
 - c. the valuation, if and to the extent relevant;
 - d. if the composition concerns a distribution: the moment or moments at which distribution will be made;
 - e. the way in which creditors and shareholders whose rights are amended pursuant to the composition can obtain further information about the composition;

- f. the procedures for voting on the composition, stipulating at least that each class of voting creditors or shareholders votes at a physical or written meeting or a meeting held by means of electronic means of communication, as well as the moment at which the meeting in question is held or the moment by which the vote must have been cast;
 - g. the way in which and the time at which the creditors and shareholders whose rights are amended pursuant to the composition can take cognisance of the results of the vote.
3. To the proposal for the composition will in any case be attached:
- a. a plan setting out how the debtor envisages assuring the continuity of his business after execution of the composition;
 - b. a list of known creditors, stating at least the amount of their claim, as well as the classes in which they are placed;
 - c. if the proposal for the composition concerns an amendment to the debtor's articles of association: a draft for this amendment to the articles of association, signed by a civil law notary;
 - d. in the case of shares, the rights of which are amended pursuant to the composition: the total number of shares issued and their nominal value, as well as the class in which the holders of those shares are placed;
 - e. in the case of depositary receipts for shares issued with the cooperation of the company, the rights of which are amended pursuant to the composition: a list of the holders of those depositary receipts, as well as the class in which the holders of those depositary receipts are placed;
 - f. in the case of securities traded on a regulated market: the total number of securities issued and their nominal value, as well as the class in which the holders of those securities are placed;
 - g. insofar as available, the financial statements and annual reports for the most recent two fiscal years for which annual statements have been prepared;
 - h. a cash flow statement;
 - i. a statement of known income and expenditure as at the moment the composition is offered;
 - j. the balance sheet and the profit and loss account or numbers for the most recent fiscal year or, to the extent necessary, an interim balance sheet or profit and loss account or numbers that provide an insight into the financial position and the results of the company until at least three months before the composition is offered;

Article 371 Disputes about assessment, classification and voting

- 1. At the request of the debtor, the creditor who offered the composition or one or more creditors and shareholders whose rights are amended pursuant to the composition, the court may appoint a delegated judge who can indicate if:
 - a. the assessment method for claims of creditors, the classification into classes or the voting procedures complies with the requirements which the court would attach to them when assessing a request as referred to in article 373:1, or
 - b. the proposal for the composition requires an amendment or addition because this would be reasonably required in order to enable the creditors and shareholders whose rights are amended pursuant to the composition to come to a sound assessment.
- 2. In the event of a difference of opinion about the admission of a creditor or shareholder to the vote or about the extent of the claim of the creditor, the appointed delegated judge or, failing that, the court will decide if and to what extent he is admitted to the vote;
- 3. The delegated judge does not make any statements as referred to in paragraph 1 and he does not take any decisions as referred to in paragraph 2 before he has given the debtor or the creditor who

- offered the composition and the creditors and shareholders whose rights are amended pursuant to the composition the opportunity to present their views.
4. Before making a statement by virtue of paragraph 1 or taking a decision by virtue of paragraph 2, the delegated judge may consult an expert.
 5. No appeal or Supreme Court review is possible against the statements and decisions made by the delegated judge as referred to in this article.

Article 372 Vote on the composition

1. The vote on the composition takes place per class of creditors or shareholders, in accordance with the procedures provided for pursuant to article 370:2(f).
2. The composition is accepted if all classes of voting creditors and shareholders have agreed to it.
3. A class of voting creditors or shareholders has agreed to the composition if:
 - a. the simple majority of the creditors and shareholders in that class and taking part in the vote have accepted the composition, and
 - b. that majority represents at least two-thirds of the amount of claims of the creditors taking part in the vote or two-thirds of that part of the issued capital represented by the shareholders taking part in the vote.
4. Subsequent changes to the number of creditors, the amount of the claims or the part of the issued capital represented by the shareholders will not affect the validity of the acceptance or dismissal of the composition or the consent of a class.
5. No later than three days after the vote, the debtor or the creditor who offered the composition prepares a report, to be signed by or on behalf of him, which at least states:
 - a. the composition;
 - b. the names of the creditors and shareholders who casted their votes;
 - c. the result of the vote, and
 - d. if a request will be made as referred to in article 373:1 and 2.
6. The debtor or the creditor who offered the composition will give the creditors and shareholders whose rights are amended the opportunity to take cognisance of the report immediately after it has been signed, in the manner provided for in the proposal of the composition pursuant to article 370:2(m).
7. If a petition for bankruptcy is pending against the debtor, the processing of which has been stayed pursuant to article 3c:2, or if a delegated judge has been appointed by virtue of the previous article, the debtor or the creditor who offered the composition will file the report referred to in paragraph 3 with the clerk of the court immediately after the vote.

Article 373 Request for declaring universally binding

1. If the composition is accepted pursuant to the provisions in the previous article, the court declares the composition to be universally binding at the request of the debtor or creditor who has offered the composition.
2. If the composition is voted down pursuant to the previous article, the court may, at the request of the debtor or creditor who offered the composition, still declare the composition universally binding if it is of the opinion that the classes that did not vote in favour of the composition could reasonably not have come to such voting behaviour, unless:
 - a. a class of creditors with a right of pledge or mortgage voted against the composition and the creditors that form part of that class pursuant to the composition receive a cash sum that is lower

- than the value, based on a private sale, of the property over which the right of pledge or mortgage is established;
- b. a class of creditors with a retention of title voted against the composition and the creditors that form part of that class pursuant to the composition receive a cash sum that is lower than the price at which the property in question was delivered to the debtor;
 - c. a class of preferential or ordinary creditors voted against the composition and the creditors that form part of that class pursuant to the composition receive a payment that is lower than the payment they would receive upon liquidation of the estate of the debtor in bankruptcy, or
 - d. a class of shareholders voted against the composition and the shareholders that form part of that class under the composition receive a payment that is lower than the payment they would have received upon liquidation of the estate of the debtor in bankruptcy.
3. Notwithstanding the provisions in the previous paragraphs, the court will dismiss the requests referred to in those paragraphs if:
- a. the interests of one or more creditors or shareholders are disproportionately prejudiced as a result of the request being allowed;
 - b. performance according to the composition is not sufficiently guaranteed;
 - c. the composition was effected through deceit, favouritism of one or more creditors or by means of other unfair means, or when it is based on a readily apparent misrepresentation;
 - d. in the opinion of the court, other compelling reasons prevent declaring the composition universally binding.
4. If declaring the composition universally binding leads to an amendment of future obligations of the debtor that arise out of the legal relationships that existed at the time the composition was offered, the creditors affected are entitled to terminate the legal relationship in question with effect from the date on which the decision about the request for declaring the composition universally binding becomes final. At the request of the creditor, the court may impose further conditions to such termination.

Article 374 The petition

1. The petition by which the requests referred to in the previous article are made is submitted no later than eight days after the creditors and shareholders whose rights are amended pursuant to the composition have been given the opportunity to take cognisance of the report referred to in article 372:5 and it will state:
 - a. the name and place of domicile of the petitioner and, if the request is submitted by a creditor, the name and place of domicile of the debtor;
 - b. a clear description of the request and the grounds on which it is based;
 - c. such details as enable the court to establish if it is competent by virtue of EC Regulation 1346/2000 of the Council of the European Union (OJEU L 160) on insolvency proceedings.
2. The following are appended to the petition:
 - a. the composition;
 - b. the proposal for the composition as referred to in article 370:2;
 - c. the documents to be attached to the composition as referred to in article 370:3;
 - d. for each class of creditors whose rights are amended pursuant to the composition: an overview listing the names and last known places of domicile of those creditors, as well as the amount and nature of each of their claims;

- e. if the rights attached to registered shares are amended pursuant to the composition: an overview listing the names and last known places of domicile of the shareholders insofar as these are known to the company, as well as the part of the issued capital they represent, and
 - f. if the rights attached to bearer shares are amended pursuant to the composition: the number of shares issued and the amount at which they were issued.
3. The court will deal with the petition as a matter of the utmost urgency.

Article 375 Determination of the date of the hearing

1. As soon as it has received the petition referred to in article 374, the court sets the date for the hearing at which the petition will be dealt with.
2. The hearing will be held at least eight days after the notice has been sent. During that time, or until a date to be set by the court, the creditors and shareholders whose rights are amended can submit in writing the reasons why they are of the opinion that the request for declaring the composition universally binding should be dismissed.

Article 376 Procedural rules for the notice and sending of procedural documents

1. The creditors and shareholders whose rights are amended pursuant to will be summoned by the petitioner by regular mail, unless stipulated otherwise by the court. If the petitioner has made a proposal to that end in the petition referred to in the previous article, the court may, in derogation from the two previous paragraphs, stipulate that the notice be effected in accordance with that proposal.
2. If the composition also concerns creditors or shareholders who do not have a place of domicile or abode in the Netherlands and an international or European Union instrument binding on the Netherlands does not prescribe a notice method, the court will instruct notification of these persons in a manner prescribed by it, to the extent necessary in one or more languages other than Dutch.
3. In derogation from article 282:2 of the Code of Civil Procedure, the court may stipulate that no copies of a statement of defence and the documents submitted need to be sent to the creditors and shareholders whose rights are amended pursuant to the composition. In derogation from article 290:1 and 2 of the Code of Civil Procedure, the court may order that the petition, the statements of defence, the documents relating to the case and the reports and, to the extent necessary, translations thereof in one or more languages other than the Dutch language are placed on one or more internet addresses to be designated by the court, in such a manner that they can be stored by the creditors and shareholders in question for subsequent inspection. The court may also order that the petitioner on request will send copies of the documents referred to in the second sentence to a creditor or shareholder whose rights are amended pursuant to the composition.

Article 377 Hearing of parties and experts

1. The court will give the debtor or creditor who offered the composition as well as the creditors and shareholders whose rights are amended pursuant to the composition the opportunity to be heard about the petition.
2. The court may order that one or more experts report about the subjects that are relevant to the petition.

Article 378 Supplementing the composition

Before making a decision about a petition as referred to in article 374:1 or 2, the court may give the parties the opportunity to amend or supplement the composition.

Article 379 Appeal

1. If the court has dismissed the petition for declaring the composition universally binding, the debtor or the creditor who offered the composition can appeal that decision within eight days of the court's decision.
2. If the court has allowed the petition for declaring the composition universally binding, the creditors and shareholders who voted against the composition can appeal that decision within eight days of the court's decision.
3. The appeal is made in a petition that is submitted to the clerk of the court of appeal.
4. The chairman will immediately set the date on which the appeal will be dealt with. That date will not be later than fourteen days after receipt of the petition. The clerk of the court of appeal where the appeal is made will immediately notify the clerk of the district court that ruled on declaring the composition universally binding.
5. Articles 374, 376 and 377 apply accordingly.

Article 380 Supreme Court review

A Supreme Court review is brought and dealt within the same terms and in the same way.

Article 381 Enforceable order and exclusion of opposition

1. The final decision regarding declaring the composition universally binding constitutes an enforceable order against the creditors and shareholders whose rights are amended pursuant to the composition, as well as against the sureties and other co-debtors of the debtor if their rights are amended pursuant to the composition.
2. Insofar as the execution of the composition requires a notarial deed, it is substituted by the final decision to declaring the composition universally binding.
3. Insofar as the execution of the composition requires measures which creditors can oppose, such opposition is excluded.

Article 382 Non-binding nature of the composition towards creditors and shareholders who were not given the opportunity to vote on the composition or who were not notified

Notwithstanding the composition having been declared universally binding, the composition is not enforceable against:

- a. a creditor or shareholder of which the debtor or creditor who offered the composition knew or should reasonably have known that his rights are amended pursuant to the composition, but to whom the composition was not presented or who was not given the opportunity to vote on it, and
- b. a creditor or shareholder whose rights are amended pursuant to the composition, but who was not properly notified of the proceedings during which the request for declaring the composition universally binding was dealt with.

Article 384 International issues

The provisions in this part apply accordingly in the event that an extrajudicial composition is offered on the basis of article [...] of the regulation referred to in article 5:3.

Article III Concurrence

[...]

Article IV Entry into force

This act comes into force at a date to be stipulated by Royal Decree.

Article V Official title

The official title of this act is: Continuity of Enterprises Act II

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

Done at,

The Minister of Security and Justice