

Amendment to the Bankruptcy Act in connection with the introduction of the possibility to confirm a private restructuring plan in order to prevent bankruptcy (Act on the confirmation of a private restructuring plan in order to prevent bankruptcy)

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

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

As We have formed the view that it is desirable to insert into the Bankruptcy Act a scheme whereby a Court may proceed to confirm a private plan for the restructuring of debts where this is necessary to ward off an impending bankruptcy;
We, therefore, with the Advisory Chapter of the Council of State, and in consultation with the States General, so having approved and decreed, likewise hereby approve and decree:

Article I

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

A

After Article 3c there is inserted Article 3d that reads:

Article 3d [Stay of a bankruptcy request]

1. Where the debtor has proposed a restructuring plan within the meaning of Article 370 aa bankruptcy petition filed against the debtor is suspended for a term not exceeding two months, which period may be extended once by a term not exceeding two months, unless:
 - a. the debtor cannot reasonably expect the Court to confirm the restructuring plan pursuant to Article 381, or
 - b. there are other grounds that oppose a suspension being granted.
2. The Court lifts the suspension where there are grounds that oppose the continuation thereof.
3. The Court takes no decisions of the nature referred to in the first and second paragraphs other than after it has given the debtor and the creditor who filed the petition for bankruptcy the opportunity to express their views in a manner to be determined by the Court.
4. The application for a bankruptcy declaration expires by operation of law when the decision to confirm the restructuring plan with the meaning of Article 381 has become effective.

B

In Article 5, first paragraph, "and 363, first paragraph" is replaced by: "363, first paragraph, 375, 376, first paragraph, 377, 380, first paragraph, and 381, third and fourth paragraphs".

C

After Article 42 there is inserted an Article 42a that reads:

Article 42a

Where the debtor, prior to the bankruptcy order, has created a right of pledge or mortgage as security for obligations under a new loan that was extended to the debtor for the purpose of enabling payments to be made that were reasonably necessary for the continuation of the enterprise during an effort to implement a restructuring plan as referred to in Article 370, in the absence of proof to the contrary, it is presumed that there was no prejudice to creditors nor knowledge thereof within the meaning of Article 42.

D

In Article 47, after "was applied for" there is inserted "unless examination of this application has, pursuant to Article 3d, been suspended".

E

A paragraph is added to Article 252 reading:

2. The provisions of this Article do not apply where, in the three years preceding the filing of the application, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which the Court denied confirmation pursuant to Article 381.

F

A paragraph is added that follows the seventh paragraph of Article 287a and that reads:

8. The provisions of this Article do not apply where, in the three years preceding the filing of the application, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which a Court refused confirmation pursuant to Article 381.

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G

A new chapter is inserted after Article 368 that reads as follows:

SECOND CHAPTER CONFIRMATION OF A PRIVATE RESTRUCTURING PLAN

§ 1 General provisions

Article 369 [Scope of application]

1. The provisions of this chapter do not apply to a debtor who is a natural person exercising neither an independent profession nor a business, nor to a bank within the meaning of Article 212g, part a, nor to an insurer within the meaning of Article 213.
2. The provisions in this chapter in respect of enfranchised creditors or shareholders apply to the creditors and shareholders who are entitled to vote pursuant to Article 378, second paragraph.
3. The provisions in this chapter in respect of the Court apply to the Court that, pursuant to Article 2, would be competent to declare the debtor bankrupt.
4. Where the debtor proposes a restructuring plan as referred to in Article 370, first paragraph, that concerns claims of which the beneficial interest, entirely or mostly, lies with a person other than the creditor, then, instead of the creditor, that other person is entitled, pursuant to Article 378, second paragraph, to vote on the restructuring plan as he sees fit. In that case the provisions of this chapter in respect of the creditor apply to that other person.
5. Where the debtor proposes a restructuring plan as referred to in Article 370, first paragraph, that also concerns shares for which depositary receipts have been issued, then, instead of the shareholder, the holders of the depositary receipts are entitled, pursuant to Article 378, second paragraph, to vote on the restructuring plan as they see fit. In that case the provisions of this chapter in respect of the shareholder apply to the depositary receipt holders. The same holds for usufructuaries.
6. Where the debtor is an association (vereniging) or a cooperative (coöperatie) the provisions of this chapter in respect of shareholders apply, mutatis mutandis, to the members.
7. The provisions in this chapter in respect of creditors apply mutatis mutandis to sureties, third parties with property against which creditors of the debtor can exercise rights, and fellow debtors with rights towards the debtor on the basis of Articles 10 or 13 of Book 6 of the Civil Code or on the basis of a contractual arrangement.
8. Where the Court appoints an expert as referred to in Article 371, first paragraph, the provisions of this chapter in respect of the debtor apply, mutatis mutandis, to that expert.
9. The provisions in this chapter do not apply to rights of employees in the service of the debtor that arise from contracts of employment within the meaning of Article 610 of Book 7 of the Civil Code.
10. The provisions of this chapter do not apply where, in the preceding three years, the debtor already proposed a restructuring plan that, in a vote as referred to in Article 378, was rejected by all classes or in respect of which a Court denied confirmation pursuant to Articles 153, 272 or 381.

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§ 2 Proposing and voting on a restructuring plan

Article 370 [The proposing of a restructuring plan by the debtor]

1. A debtor who foresees his inability to continue paying his debts as they fall due may propose a restructuring plan to his creditors and his shareholders, or a number of them, that allows for a modification of their rights.
2. If it is reasonably likely that, following the confirmation of the restructuring plan referred to in the first paragraph, sureties, third parties with property against which creditors of the debtor can exercise rights, or fellow debtors of the debtor, will be unable to continue paying their debts as they fall due, the restructuring plan may also allow for a modification of the rights of creditors towards such sureties, third parties or fellow debtors. In that case the provisions of this chapter in respect of the debtor also apply to these sureties, third parties and fellow debtors, subject to the proviso that the debtor remains exclusively entitled to file an application as referred to in Articles 376, first paragraph, 377, and 380, first paragraph.
3. Where the debtor is a legal person, Articles 38 and 107a and Title 5.3 of Book 2 of the Civil Code, neither any provisions under law nor any arrangements agreed upon between the entity and its shareholders in respect of decision-making by the general meeting apply to the proposing of a restructuring plan as referred to in the first paragraph and to the execution of a restructuring plan that has been confirmed by the Court pursuant to Article 381.

Article 371 [The proposing of a restructuring plan by the creditor]

1. If it can reasonably be assumed that a debtor will be unable to continue paying his debts as they fall due, a creditor may request the debtor in writing to propose a restructuring plan within the meaning of Article 370. If, within one week, the debtor does not undertake to do so, or if, after having given this undertaking, one month has elapsed and no restructuring plan has yet been proposed which has a reasonable prospect of being confirmed by the Court pursuant to Article 381, the Court may, at the creditor's request, appoint an expert who will then have the right, to the exclusion of the debtor, to propose a restructuring plan.
2. The Court may also, on the application of a creditor, appoint an expert as referred to in the first paragraph where the debtor has proposed a restructuring plan which, upon a vote as referred to in Article 378, has not been accepted by a single class or in respect of which the Court has denied confirmation on the basis of Article 381.
3. Upon request or of his own motion, the debtor must provide, in accordance with any directions thereby given, the expert referred to in the first and second paragraphs with all information and cooperation which the expert states he needs for the exercise of his duties or in respect of which the debtor knows, or ought to know, that these are relevant.
4. Save in the context of the provisions of this chapter, the expert does not share with others the information obtained pursuant to the third paragraph.
5. The applications referred to in the first and second paragraphs are examined in chambers. The Court takes no decision other than after it has given the debtor and the

creditor who lodged the request the opportunity to express their views in a manner to be determined by the Court.

6. No appeal may be filed against the decision of the Court as referred to in the first paragraph.

Article 372 [Executory contracts]

1. A debtor within the meaning of Article 370, first paragraph, may make a proposal to a counterparty with whom he has concluded an executory contract seeking to modify that contract. If the counterparty does not agree to the proposal, the debtor may terminate the contract, provided that the termination takes at a time at which, under local custom, such agreements usually terminate and the agreed or customary notice period is observed, subject to the proviso that a three month termination period will in any case suffice.
2. Upon a modification or termination referred to in the first paragraph, the counterparty obtains a claim for damages against the debtor. Chapter 10 of Title 1 of Book 6 of the Civil Code applies. The restructuring plan referred to in Article 370, first paragraph, may allow for a modification of this claim for damages.
3. The proposing of a restructuring plan as referred to in the first paragraph, as well as events that are directly linked thereto, do not constitute a ground for modification of obligations or duties of, or towards, the debtor, for the suspension of the performance of an obligation towards the debtor and for the rescission of a contract concluded with the debtor.

Article 373 [Class formation]

Where a restructuring plan concerns creditors or shareholders who have interests or rights or who would receive rights under the restructuring plan that are so different that they cannot be said to be in a comparable position, those creditors and shareholders must be placed into different classes. In any case creditors or shareholders that have a different rank in bankruptcy must be placed into different classes.

Article 374 [The restructuring plan]

1. The restructuring plan must contain all the information that the enfranchised creditors and shareholders need to form an educated view on the restructuring plan before the votes takes place referred to in Article 378, and must in any event include:
 - a. the class formation and the criteria on the basis of which the creditors and shareholders have been placed into one or more classes;
 - b. the financial consequences of the restructuring plan for each class of creditors and shareholders;
 - c. the expected value of the assets and liabilities of the debtor in the event that the restructuring plan were to become effective, together with the underlying valuation principles, and the expected proceeds in the event of a liquidation of the assets of the debtor in bankruptcy;
 - d. if the restructuring plan provides for the granting of rights to the creditors or shareholders: the point in time at which those rights are to be granted;

- e. the manner in which the creditors and shareholders may obtain further information about the restructuring plan, and
 - f. the procedure governing the vote on the restructuring plan as well as the point in time at which the vote will take place or the vote must have been cast.
2. The restructuring plan must in any event be accompanied by the following schedules:
 - a. a properly specified overview of assets and liabilities as set out in Article 96, and
 - b. a list in which:
 - 1° the enfranchised creditors and shareholders are identified by name or, where this is not possible, are identified by reference to one or more categories of debts,
 - 2° the amount of their claim or the nominal amount of their shares is stated, and
 - 3° the classes into which they have been placed are specified.
 3. By administrative decree further rules may be issued on further information that is to be contained in the restructuring plan or in the documents attached thereto and the manner in which this information is to be provided.

Article 375 [Stay of enforcement]

1. Where a debtor has proposed a restructuring plan as referred to in Article 370, he may request the Court to order a stay. During this period, the duration of which may not exceed two months, any right of a third party to recover against property of the debtor or to repossess property that is under the debtor's control may not be exercised, save with the Court's authorisation. The Court may prolong this period once by a period of no more than two months.
2. The request for a stay referred to in the first paragraph is denied where there is no reasonable prospect that the Court will confirm the restructuring plan pursuant to Article 381.
3. Articles 241a, second and third paragraphs, 241c, 241d apply mutatis mutandis, subject to the proviso that in the context of the application of Article 241a, third paragraph, this concerns a term imposed on the debtor.
4. The Court lifts the stay where there are reasons that oppose its continuation. The Court takes no decision on this matter other than after it has given the debtor an opportunity to express his views in a manner to be determined by the Court.
5. No appeal may be filed against a decision of the Court pursuant to in this Article.

Article 376 [Early determinations by the Court]

1. Until such time as debtor has submitted the definitive restructuring plan to the creditors or shareholders pursuant to Article 378, first paragraph, the debtor may request the Court to render a decision on a dispute concerning:
 - a. the competence of the debtor to propose a restructuring plan on the basis of this chapter;
 - b. the content of the information set out in the restructuring plan or in the documents attached thereto;
 - c. the right of a creditor or shareholder to vote;
 - d. the class formation;

- e. the proposed voting procedure, or
 - f. the question whether, if all classes were to consent to the restructuring plan, a ground for denying the confirmation as set out in Article 381, second and third paragraphs, would apply.
2. Where there is a dispute concerning the right of a creditor or shareholder to vote or the amount for which such creditor or shareholder is allowed to vote, the Court determines whether, and up to which amount, that creditor or shareholder will be permitted to vote on the restructuring plan. Article 147 applies correspondingly.
 3. In the context of a judgment to be rendered by the Court, the Court may appoint one or more experts so as to perform an investigation and issue a reasoned report of their findings, within a term to be determined by the Court.
 4. If any information as referred to in Article 374 is lacking in the restructuring plan or in the documents attached thereto, the Court may grant the debtor a reasonable term within which to supply the missing information before taking a decision as referred to in the first and third paragraphs.
 5. The applications referred to in the first paragraph are examined in chambers. The Court takes no decisions as referred to in the first and second paragraphs other than after it has given the debtor and the creditors or shareholders involved in the dispute the opportunity to express their views in a manner to be determined by the Court.
 6. No appeal may be lodged against decisions of the Court rendered pursuant to this article.

Article 377 [Bespoke measures]

Where a debtor has proposed a restructuring plan as referred to in Article 370, the Court, may, whether at the debtor's request or of its own motion, issue such rulings and impose such directions as it deems necessary to safeguard the interests of the creditors or the shareholders. The Court may also do this on the occasion of:

- a. a stay of a bankruptcy request as referred to in Article 3d, first paragraph, at the request of the creditor referred to in that paragraph;
- b. a stay of enforcement as referred to in Article 375, first paragraph, at the request of the third parties referred to in that paragraph, or
- c. when taking a decision as referred to in Article 376, first and second paragraphs, at the request of the creditors or shareholders involved in the dispute.

Article 378 [Voting]

1. Within a reasonable term that in any case may be no shorter than eight days prior to the taking place of the vote, the debtor must provide the definitive restructuring plan to the enfranchised creditors and shareholders or notifies them of the manner in which they may take cognisance thereof, in order for them to be able to form an educated view on the matter.
2. The creditors and shareholders who are enfranchised are those whose rights are modified on the basis of the restructuring plan.
3. The voting on the restructuring plan is carried out by each class of creditors or shareholders, according to the procedure set forth in the information provided

pursuant to Article 374, first paragraph, part F, in a meeting that is either physical or that is to be held by electronic means or in writing.

4. A class of creditors has consented to the restructuring plan where the decision granting consent has been taken by a group of creditors that in aggregate represents no less than two thirds of the total amount of claims belonging to the creditors that cast their vote within that class.
5. A class of shareholders has consented to the restructuring plan where the decision granting consent has been taken by a majority of no less than two thirds of the number of votes cast.

Article 379 [Report]

1. As soon as possible, and in no case no later than seven days after the vote, the debtor must prepare a report stating:
 - d. the names of the creditors and shareholders that cast their votes;
 - e. the result of the vote;
 - f. the creditors and shareholders that voted for or against the restructuring plan, as well as amount of the claims or shares for which they cast their vote, and
 - g. such other matters as took place at the meeting at which the vote took place.
2. The debtor must immediately enable the enfranchised creditors and shareholders to take cognisance of the report. If a request for confirmation as referred to in Article 380, first paragraph, is made by the debtor, the debtor must deposit the report with the Clerk of the Court. The report must be made available there for a period of eight days for inspection by the enfranchised creditors and shareholders without charge.

§ 3 Confirmation of the restructuring plan

Article 380 [Confirmation hearing]

1. If at least one class has consented to the restructuring plan, the debtor may file a request with the Court for confirmation of the restructuring plan. In that case the Court issues as soon as possible a decision scheduling the confirmation hearing. The debtor notifies the enfranchised creditors and shareholders in writing of this decision.
2. The hearing will be held no less than eight and no more than fourteen days after the report referred to in Article 379 has been deposited for inspection with the Clerk.
3. Until the day of the hearing referred to in the foregoing paragraph, the creditors and shareholders who voted against the restructuring plan may file with the Court an application as referred to in Article 381, third and fourth paragraphs in which they set out the grounds on which they believe confirmation ought to be denied. The creditor may not invoke a ground for denying confirmation where he has failed to raise his complaint with the debtor promptly after he discovered, or ought reasonably to have discovered, the possible existence of the relevant ground for denying confirmation.

Article 381 [Confirmation requirements]

1. The Court renders as soon as possible a reasoned decision in which it grants the request for confirmation, unless one of the grounds for refusal set forth in the second

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- to fourth paragraphs is applicable.
2. The Court investigates of its own motion whether the debtor has complied with the provisions of Articles 378, first paragraph, and 380, first paragraph, in respect of all enfranchised creditors and shareholders. If this is not the case, the Court refuses confirmation, unless the creditors and shareholders concerned accept the restructuring plan.
 3. The Court refuses confirmation at the request of one or more creditors or shareholders who voted against the restructuring plan, where:
 - a. the debtor had no competence to propose a restructuring plan on the basis of this chapter;
 - b. the information set out in the restructuring plan or in the documents attached thereto was insufficient, if the class formation did not comply with the requirements of Article 372 or if the voting procedure did not comply with the applicable requirements, unless any such flaw could not reasonably have resulted in a different outcome of the vote;
 - c. a creditor or the shareholder should have been admitted to the vote on the restructuring plan for another amount, unless this decision could not reasonably have resulted in a different outcome of the vote;
 - d. on the basis of summary investigation it is clear that the rights that these creditors or shareholders would receive under the restructuring plan have a value that is significantly lower than the amount that could expect to receive upon a liquidation of debtor's assets in bankruptcy;
 - e. the performance of the restructuring plan has not been sufficiently safeguarded;
 - f. the restructuring plan has come about by deception, by inducements extended to one or more enfranchised creditors or shareholders or with the help of other forms of dishonesty, irrespective of whether the debtor or another person lent his assistance thereto;
 - g. the fees and the disbursements of experts appointed by the Court have not been paid or properly secured, or
 - h. other cogent reasons that oppose confirmation exist.
 4. The Court refuses confirmation of a restructuring plan to which not all classes have consented where an application to that effect has been filed by one or more creditors or shareholders who themselves voted against the restructuring plan and who were placed in a class that did not consent to the restructuring plan and such class consists of:
 - a. creditors or shareholders who would receive rights under the restructuring plan that have a value that is lower than the amount of the claims or the nominal amount of the shares for which they should have been allowed in that class, while there are one or more lower ranking classes of creditors or shareholders who receive or retain rights under the restructuring plan, unless those rights constitute arm's length consideration for the provision of a new loan or new capital;
 - b. creditors or shareholders who would receive rights under the restructuring plan that have a value that is lower than the amount of the claims or the nominal amount of the shares for which they should have been allowed in that class, while there are one or more higher ranking classes of creditors or shareholders who would receive rights under the restructuring plan that have a value that

- is higher than the amount of the claims or the nominal value of the shares for which they should have been allowed in that class;
- c. creditors or shareholders who would receive rights under the restructuring plan that, without reasonable ground, have a value that is comparatively lower than the value of the rights which another class of equally ranked creditors or shareholders would receive under the restructuring plan;
 - d. creditors or shareholders whose rights are modified on the basis of the restructuring plan, while there are other creditors or shareholders with an equal or lower rank who, without reasonable ground, remain outside the restructuring plan, or;
 - e. creditors who under the terms of the restructuring plan do not have the right to opt for a payment in the form of cash in an amount equal to the amount that they could reasonably expect to receive upon a liquidation of the debtor's assets in bankruptcy.
5. The confirmation decision can provide that, upon becoming effective, it serves as any resolution of the general meeting of shareholders that may be required to execute the restructuring plan.
 6. Save for the possibility of an appeal to the Supreme Court in the interest of law, no remedy is available for challenging a decision of the Court rendered pursuant to the first paragraph.

§ 4 The consequences of confirmation of the restructuring plan

Article 382 [Binding force of the restructuring plan]

1. A confirmed restructuring plan binds all enfranchised creditors and shareholders.
2. Where the debtor is a public limited company or private limited company, Articles 81 and 192 of Book 2 of the Civil Code disapply.

Article 383 [Enforceable title]

A confirmation decision that has become effective provides for the benefit of the creditors having claims not disputed by the debtor a title eligible for enforcement against the debtor and against persons having acceded to the restructuring plan as sureties, in so far as this is consistent with the nature of the rights which the creditors receive under the restructuring plan.

Article 384 [Non-performance of the restructuring plan]

The debtor is in default where there is any failure to perform the restructuring plan and is obliged to reimburse the loss which the creditors or shareholders sustain as a result thereof, unless no blame can be attributed to the debtor for such non-performance. Article 75 and chapter 10 of Title 1 of Book 6 of the Civil Code apply mutatis mutandis. The ability to rescind or annul the restructuring plan may be excluded in the restructuring plan.

Article II Concatenation [PM]

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Article III Coming into force

This Act comes into force at a time to be determined by Royal Decree (Koninklijk Besluit), which time may be set so as to vary for different Articles or parts thereof.

Article IV Title for citation purposes

This Act is to be cited as: Act on the confirmation of a private restructuring plan in order to prevent bankruptcy.

Enjoins and orders that this be placed in the Bulletin of Acts and Decrees (Staatsblad) and that all ministries, public authorities, public bodies and officials concerned by it ensure its meticulous execution.

Issued,

The Minister of Security and Justice

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