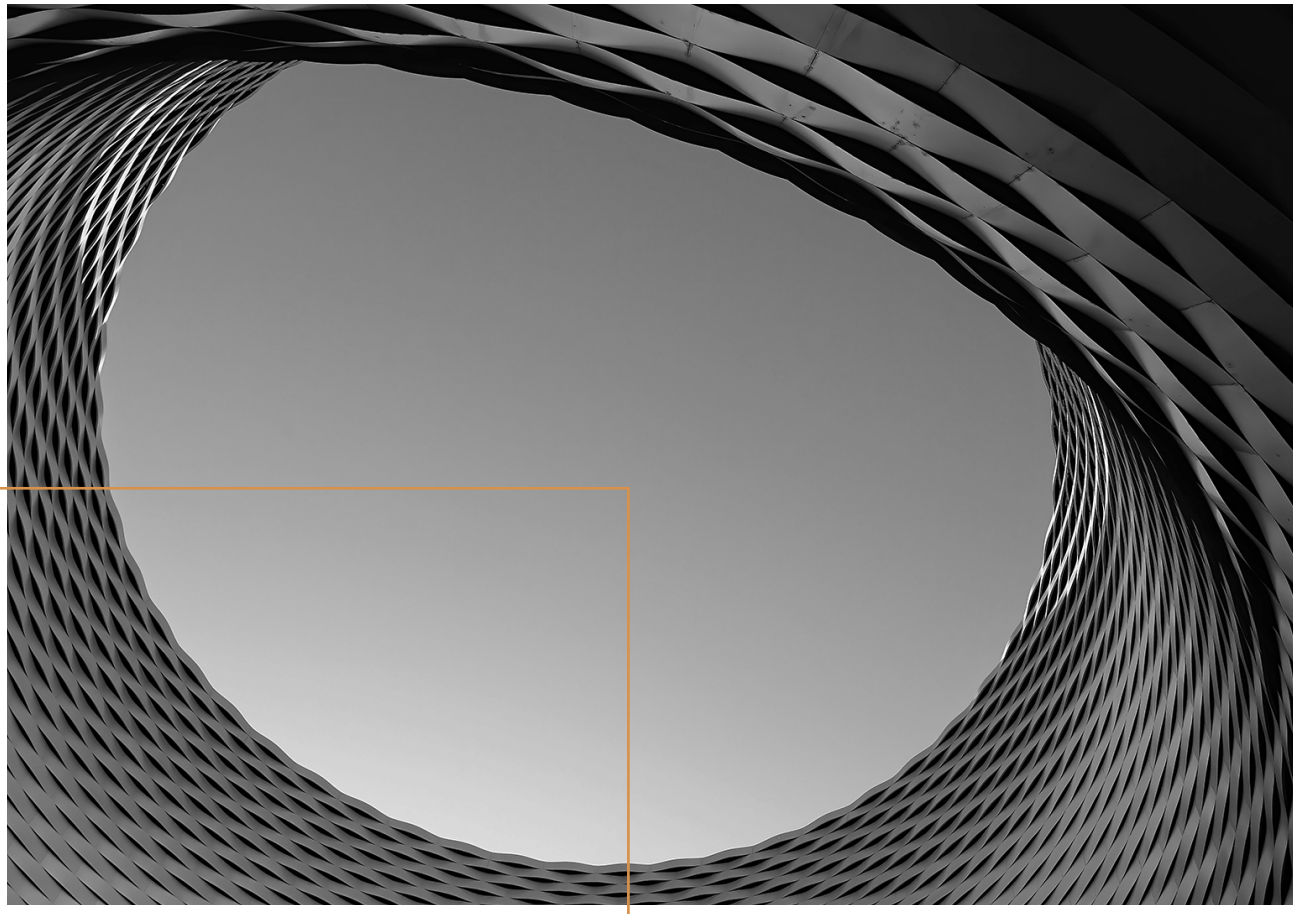
RESOR

PROVISIONS OF

THE DUTCH SCHEME



DATE 1 January 2023

PROVISIONS OF DUTCH SCHEME

(AS INCLUDED IN THE BANKRUPTCY ACT AS PER 1 JANUARY 2023)

SECTION ONE DECLARATION OF BANKRUPTCY

Article 3d ***Concurrent applications for bankruptcy and the appointment of a restructuring expert***

1. Where an application for bankruptcy submitted by the debtor itself or by a creditor is made at the same time with a request to appoint a restructuring expert as meant in Article 371, the latter request shall be considered first.

2. The court shall in any event stay consideration of the application for bankruptcy until it has given a decision on the request to appoint a restructuring expert. Where the court grants the application it shall simultaneously order a stay under Article 376, and the stay shall remain in force throughout that period.

Article 42a ***Protection of security for new financing***

1. The preceding article[1] may not be invoked to annul a legal act performed after the debtor has submitted a declaration to the clerk of the court as meant in Article 370(3) or after the court has appointed a restructuring expert under Article 371 if the court, upon the debtor's request, has granted prior approval of that act. The court shall grant the requested approval if, at the time the approval is granted, it can be reasonably be assumed that:

   a. the legal act is necessary to (1) continue the debtor's business during the preparation of a plan as meant in the articles referred to in the preamble of this article, or (2) to prepare, put to vote or have approved in accordance with Article 384 a plan as meant in the articles referred to in the preamble of this article; and

   b. this legal act would be in the interests of the general body of creditors and would not materially prejudice the interests of any individual creditors.

2. Articles 369(7–10) and 371(2) first, second and fifth sentences, and (14), apply *mutatis mutandis*.

Article 47 ***Annul obligatory legal acts***

The performance by the debtor of a due and demandable obligation can only be nullified if it is proved, either that the person receiving the performance knew at that moment that already a request (petition) for a bankruptcy application in respect of the debtor was filed and consideration of that application has not been stayed under Articles 3d(2) and 376(2)(c), or that the performance is the result of consultations between the debtor and the creditor with the intention to favour that creditor over other creditors.

Article 54(3) ***Setoff***

A person who invokes setoff is acting in good faith as meant in Article 54(1) if this setoff:

a. takes place after the debtor has submitted a declaration to the clerk of the court as meant in Article 370(3) or after the court has appointed a restructuring expert under Article 371; and

b. is invoked in the context of financing the continuation of the debtor's business and does not aim to restrict that financing.

Article 215(3–4) ***Simultaneous requests***

3. Where an application for suspension of payment proceedings is made at the same time as a request to appoint a restructuring expert as meant in Article 371, the latter request shall be considered first and in derogation from Article 371(2) preliminary suspension of payment proceedings will not ensue.

4. The court shall in any event stay consideration of the application for suspension of payment proceedings until it has decided on the request to appoint a restructuring expert. Where the court grants the application, it shall simultaneously order a stay under Article 376 and the stay shall remain in force throughout that period.

SECTION TWO THE CONFIRMATION OF A PLAN

SECTION 1. GENERAL PROVISIONS

Article 369 ***Scope of application***

1. The provisions of this Section do not apply where the debtor is a natural person who does not practise an independent profession or carry on a business, a bank as meant in Article 212g(a), or an insurer as meant in Article 213(a). In this article, an SME is understood to mean: an enterprise employing fewer than 250 persons and whose annual turnover in the previous financial year was € 50 million or the

balance sheet total at the end of the previous financial year did not exceed € 43 million.

2. The provisions of this Section concerning creditors or shareholders with voting rights apply to creditors and shareholders with voting rights under Article 381(2).

3. Where the debtor is an association or cooperative, the provisions of this Section concerning shareholders apply *mutatis mutandis* to the members.

4. The provisions of this Section do not apply to:

   a. rights of employees employed by the debtor arising from employment contracts within the meaning of Article 610 of Book 7 of the Civil Code;

   b. claims in respect of pension installments that have already expired or will be paid out in the future;

   c. financial security agreements and set-off clauses within the meaning of Article 51 of Book 7 of the Dutch Civil Code; and

   d. powers as referred to in Article 212b(2) and orders and legal acts arising therefrom as referred to in Article 212b(3).

   Rights of employees as referred to in paragraph a also include claims of employees for payment by their employer of contributions to a pension provider, a pension institution from another Member State or an insurer with its registered office outside the Netherlands as referred to in Article 23(1) of the Pensions Act or, if the pension agreement is not governed by Dutch law, a similar institution from another Member State in the European Union or a third country.

5. Except in cases involving the appointment of a restructuring expert as meant in Article 371, the provisions of this Section do not apply if the debtor has proposed a plan in the last three years that was rejected by all classes in a vote as meant in Article 381 or that the court refused to confirm on the basis of Article 384.

6. A plan under this Section may be proposed in either a confidential pre-insolvency plan procedure or a public pre-insolvency plan procedure.

7. The jurisdiction of the Dutch court to consider requests such as those as meant in this Section is determined:

   a. on the basis of the Regulation referred to in Article 5(3)[2], insofar as the requests are submitted in the context of a public pre-insolvency plan procedure and that Regulation applies; or

   b. on the basis of Article 3 of the Dutch Code of Civil Procedure[3].

8. The provisions of this Section concerning the court apply to courts that are competent under Article 262 or Article 269 of the Dutch Code of Civil Procedure[4] to consider requests such as those described in this Section. Once the court has declared its competence to consider a request in relation to the debtor in the context of a confidential pre-insolvency plan procedure or public pre-insolvency plan procedure, that court is also competent, to the exclusion of other competent courts, to hear all further requests on the basis of this Section that are submitted in relation to the debtor in those proceedings. Where legal entities that form a group as meant in Article 2:24b of the Dutch Civil Code[5] propose a plan on the basis of this Section, they may jointly request one of the competent courts to consider all requests submitted on the basis of this Section in the context of preparing a plan in relation to these legal entities.

9. Unless the plan is prepared and proposed in the context of a public pre-insolvency plan procedure, requests to the court in the context of this Section are dealt with in the judge's chambers.

10. Unless determined otherwise, decisions of the court in the context of this Section are not subject to any ordinary remedies.

11. The provisions of this Article are without prejudice to:

    a. the provisions of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (PbEU 2012, L 201);

    b. the rules on the protection of funds for payment institutions under Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/ 110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010 and repealing Directive 2007/64/EC (PbEU 2015, L 337); and

    c. the rules on the protection of funds for electronic money institutions pursuant to Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 relating to the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (PbEU 2009, L 267).

SECTION 2. PLANS: PROPOSING AND VOTING

Article 370 *Plan proposed by the debtor*

1. If it can reasonably be assumed that the debtor will not be able to continue paying its debts as they fall due, the debtor may propose to its creditors and shareholders, or any number of them, a plan that amends their rights and can be confirmed by the court under Article 384.

2. Where a third party, that may include a guarantor and a joint debtor, is liable for an obligation of the debtor to a creditor as meant in Article 370(1) or has provided any form of security for the satisfaction of that obligation, Article 160 of the Bankruptcy Act[6] applies *mutatis mutandis*, unless a plan is proposed as meant in Article 372(1). The third party may not recover from the debtor any amounts paid to the creditor where such payments were made after confirmation of the plan. Where the third party satisfies liabilities of the debtor in whole or in part while the creditor has also been offered rights under the plan in satisfaction of those liabilities, those rights under the plan transfer to the third party by operation of law, if and insofar as the payment by the third party and the rights conferred under the plan would provide the creditor with value that exceeds the amount of its claim as it existed before the plan was confirmed.

3. As soon as the debtor starts to prepare a plan, the debtor shall submit a declaration to that effect to the clerk at the court where that declaration shall remain for no longer than one year. If a works council or an employee representative body has been set up in the company operated by the debtor pursuant to statutory provisions, the start declaration shows how the works council or employee representative body has been informed about the start of preparations for a plan. Submitting the declaration is free of charge. Once the debtor has presented the plan to creditors and shareholders with voting rights, the declaration is available for their inspection, free of charge, until the court has decided on the request as meant in Article 383(1) or until the report as meant in Article 382 has been submitted, in which the debtor gives notice that it will not submit such a request.

4. A debtor that proposes a plan in the context of a public pre-insolvency plan procedure shall request the clerk at the court of The Hague, immediately after the court has taken its first decision on the basis of this Section, to publish the information as meant in Article 24 of the Regulation referred to in Article 5(3)[7] without delay in the registers referred to in Articles 19 and 19a, and in the Government Gazette (*Staatscourant*).

5. Where the debtor is a legal entity, the board does not require the approval of the general meeting or a meeting of holders of shares of a given type or specification to propose a plan as meant in Article 370(1) or to implement a plan confirmed by the court under Article 384, and insofar as and for as long as the following derogations are necessary, and without prejudice to the principle of equal treatment of all shareholders, Articles 38, 96, 96a, 99, 100(1), 107a and 108a and Book 2, Title 5.3 of the Dutch Civil Code, as well as Article 5:25ka of the Dutch Act on Financial Supervision and any statutory provisions or arrangements agreed privately between the entity and its shareholders or between two or more shareholders in regard to decision-making by the general meeting or a meeting of holders of shares of a certain type or specification shall not apply. Where a resolution of the general meeting or a meeting of holders of shares of a given type or specification would be required to implement a plan, such resolution shall be substituted by the plan that has been confirmed by the court under Article 384.

Article 371 ***Creditor's right to initiate a plan through the appointment of a restructuring expert***

1. Each creditor, shareholder or statutory works council or workplace representation that is set up in the debtor's business may submit a request that the court appoint a restructuring expert who may propose a plan to the debtor's creditors and shareholders, or any number of them, under this Section. The debtor may also submit such request. In that case, Article 370(5) applies *mutatis mutandis*. If the request is granted, the debtor may not propose a plan on the basis of Article 370(1) as long as the restructuring expert remains appointed. The debtor may submit a plan to the restructuring expert with the request that he proposes this to the creditors and shareholders who are entitled to vote, after which the restructuring expert complies with this request in a manner to be determined by him and within a period to be determined by him.

2. Where the court has not yet taken a decision under this Section, the applicant, as meant in Article 371(1), shall indicate which of the procedures of Article 369(6) they have chosen, stating the reason for that choice. The request must include such information as to enable the court to determine whether it has jurisdiction. Where the request is not submitted by the debtor, the debtor shall be given an opportunity to express its views, in a manner and within a period determined by the court, on the choice from the procedures mentioned in Article 369(6). In the event of a dispute on the matter, the court shall decide which of the procedures as meant in Article 369(6) apply. Article 370(4) applies *mutatis mutandis*, with the exception that the restructuring expert or the debtor may make the request as meant in Article 370(4).

3. Where the debtor is in a state as described in Article 370(1), the court shall grant the request as meant in Article 371(1), unless there is *prima facie* evidence that this is not in the interests of the general body of creditors. A request for the appointment of a restructuring expert will in any case be granted if it has been submitted by the debtor himself. In principle, this also applies if the request is supported by the majority of the creditors, noting that in that case the fifteenth paragraph applies in full. If the request is granted, the court will appoint a restructuring expert who is adequately trained and who has the expertise required for his tasks. If a works council or a staff representative body has been set up in the company run by the debtor pursuant to statutory provisions, the court will make the appointment subject to the condition that the restructuring expert informs this works council or staff representative body of his appointment as soon as possible. As part of the appointment:

    a. the court takes into account the specifics of the case, including any cross-border elements, and the experience and expertise of the restructuring expert; and

    b. the court uses a procedure and conditions that are clear, transparent and fair.

4. The court may appoint one or more experts to assess whether a state exists as described in Article 371(3). Article 378(6), first and fourth sentences, and Article 371(7) and (8) apply *mutatis mutandis*.

5. Before taking a decision pursuant to Article 371(1), the court shall offer the applicant described in Article 371(1), the debtor and the observer described in Article 380, if appointed, an opportunity to express their views in a manner and within a period determined by the court. This also applies to decisions pursuant to Article 371 (10), (12) and (13). In the latter three cases, the court shall also call on the restructuring expert to be heard.

6. The restructuring expert shall carry out his tasks in an effective, impartial and independent manner.

7. The restructuring expert is entitled to consult the debtor's records, documents and other data carriers where the restructuring expert considers examination of the debtor's records, documents and other data carriers necessary for the proper performance of his tasks.

8. The debtor or its directors, the shareholders and supervisory directors, if any, and the employees of the debtor shall provide all information the restructuring expert requests and in the manner he specifies. They shall inform the restructuring expert on their own initiative of facts and circumstances that they know or ought to know are relevant to the restructuring expert for the proper performance of his tasks and provide him all cooperation necessary.

9. The restructuring expert shall not share the information received with third parties, other than as required for the application of the provisions of this Section.

10. The court shall determine the salary of the restructuring expert on the basis of principles that express the importance of an efficient handling of the plan procedure. The court shall also determine the maximum cost of the work of the restructuring expert and any third parties he consults. The court may increase this amount during the process at the request of the restructuring expert. Unless agreed otherwise, the costs shall be paid by the debtor, it being understood that where the majority of creditors support a request to appoint restructuring expert, the creditors shall bear the costs. To that end, the court may require security for costs or the transfer of an advance to the court's bank account as a condition for the appointment. If the request for the appointment of a restructuring expert is supported by the majority of the creditors, the applicant shall state in the request the maximum amount that, in his opinion, the work of the restructuring expert and of the third parties consulted by him may cost and expresses his views on how the creditors will bear these costs.

11. The restructuring expert is not liable for losses sustained in any attempt to put a plan into effect under this Section, unless he can be held personally to blame for his failure to act as might reasonably be expected of a restructuring expert with sufficient experience and expertise who carries out his task with care and diligence.

12. As soon as it is clear that a plan cannot be put into effect under this Section, the restructuring expert shall duly notify the court and request that his appointment be revoked.

13. The restructuring expert's appointment ends by operation of law as soon as the court confirms the plan under Article 384, unless the court determines in its confirmation decision that the restructuring expert's appointment shall continue for a period determined by the court. Having heard or properly notified the restructuring expert, the court may also dismiss and replace him at any time, either at his own request, at the request of one or more creditors, or on its own initiative.

14. Where the court has not previously taken a decision under this Section, and where the jurisdiction of the court is derived from the Regulation referred to in Article 5(3)[8], the appointment decision must indicate whether the procedure is a main proceeding or a territorial proceeding within the meaning of that Regulation. Any creditor who has not yet been given an opportunity to express its views on the basis of Article 371(5) may challenge the decision on the ground of lack of international jurisdiction as meant in Article 5(1) of that Regulation within a period of eight days after the publication referred to in Article 370(4).

15. Does a request as referred to in the first paragraph relate to a debtor who runs an SME or to a debtor who belongs to a group as referred to in Article 24b of Book 2 of the Civil Code that runs an SME and is, at the time the request is made, a declaration as referred to in Article 370(3) has not already been filed with the court registry, the court will only grant that request if the debtor agrees to this. If the debtor is a legal entity, the shareholders may not unreasonably prevent the board from giving its consent. If the court finds that the board has no good reason for refusing to grant consent, it may determine that its decision has the same force as the board's consent.

Article 372 ***Restructuring group guarantees***

1. A plan as meant in Article 370(1) may also amend the rights of creditors against legal entities that form a group with the debtor as meant in Article 2:24b of the Dutch Civil Code, provided that:

    a. the rights of those creditors against the relevant legal entities entail payment of or security for the obligations of the debtor or obligations for which the legal entities are liable together with or alongside the debtor;

    b. the relevant legal entities are in a state as meant in Article 370(1);

    c. the relevant legal entities have approved the proposed amendment or the plan is proposed by a restructuring expert as meant in Article 371; and

    d. the court would have jurisdiction if these legal entities were to propose their own plan under this Section and submit a request as meant in Article 383(1).

2. In the case of a plan as meant in Article 372(1):

a. the debtor or the restructuring expert as meant in Article 371 must also provide the information as meant in Article 375 for the legal entities described in Article 372(1); and

b. in considering the request to confirm the plan, the court shall also establish, on its own initiative or upon request, whether the plan meets the requirements of Article 384 in respect of these legal entities.

3. Only the debtor or the restructuring expert, if appointed, is authorised to submit the requests as meant in Articles 376(1), 378(1) 379(1) and 383(1) to the court on behalf of the legal entities as meant in Article 372(1).

Article 373 ***Executory contracts***

1. Where the debtor is in a state as meant in Article 370(1), the debtor or the restructuring expert, if appointed, may propose to a counterparty that an agreement it has concluded with the debtor be amended or terminated. If the counterparty does not agree to the proposal, the debtor or restructuring expert may have the agreement prematurely terminated, provided that a plan proposed under Article 384 is confirmed by the court and the court grants leave for this unilateral termination in the confirmation. The termination is then notified by operation of law on the date on which the court confirms the plan and becomes effective after expiry of a notice period specified by the debtor or the restructuring expert. Where the court considers this period to be unreasonable, it may provide for a longer notice period when granting leave for termination, it being understood that three months from the date of confirmation of the plan is in any event sufficient.

2. Following a unilateral termination under Article 373(1), the counterparty is entitled to compensation for termination of the agreement. Book 6, Title 1, Section 10 of the Dutch Civil Code applies. The plan as meant in Article 370 (1) may amend the future right to compensation.

3. The preparation and proposal of a plan as meant in Article 370(1), the appointment of a restructuring expert as meant in Article 371, and events and acts that are directly related and reasonably necessary to the implementation of the plan, such as the request for and the announcement of a stay as referred to in Article 376, do not constitute grounds for amending commitments or obligations to the debtor, for suspending performance of an obligation to the debtor, or for terminating an agreement concluded with the debtor.

4. Where a stay has been ordered under Article 376, a default by the debtor in paying a debt that arose before the stay does not constitute grounds during the stay for amending commitments or obligations to the debtor, for suspending performance of an obligation to the debtor or for terminating an agreement concluded with the debtor, if security is provided for the performance of new obligations that arise during the stay.

Article 374 ***Class formation***

1. Creditors and shareholders are placed in different classes if the rights they have in the liquidation of the debtor's assets in bankruptcy or the rights they are offered under the plan are so different that they are not in a comparable position. In any event, creditors or shareholders shall be placed in different classes if upon enforcement against the debtor's assets they have a different ranking under Book 3, Title 10 of the Dutch Civil Code, any other law or instrument based on it or under an agreement.

2. Ordinary unsecured creditors are placed into one or more separate classes, if:

    a. these creditors at the time that the plan is put to vote in accordance with Article 381 are a legal entity as referred to in Articles 395a and 396[9] of Book 2 of the Dutch Civil Code or a creditor who employs fifty persons or less or is stated to employ fifty persons or less in the Trade Register and have a claim arising from the delivery of goods or services or wrongful conduct as referred to in Article 162 of Book 6 of the Dutch Civil Code, and

    b. these creditors are offered under the terms of the plan a distribution in cash that is less than 20% of the nominal amount of their claim or a right with a value that is less than 20% of the nominal amount of their claim.

3. Creditors with priority on the basis of a right of pledge or mortgage within the meaning of Article 278(1) of Book 3 of the Dutch Civil Code are placed into one or more classes of creditors with similar ranking only for the secured part of their claim, unless this does not affect the distribution of the value that is realised under the plan. For the remaining part of their claim these creditors are placed in a class of ordinary unsecured creditors. The secured portion of the claim is determined by the value that the secured creditor would expectedly receive in the event of bankruptcy in accordance with the statutory ranking on the basis of its right of pledge or mortgage.

Article 375 ***Content of the plan***

1. The plan shall contain all information that creditors and shareholders need to come to an informed opinion prior to the vote as meant in Article 381, including:

    a. the name of the debtor and, if there is no appointment of a restructuring expert, an electronic mail address at which the debtor can be reached;

    b. where applicable, the name of the observer or of the restructuring expert and an electronic mail address at which the restructuring expert can be reached;

    c. the class formation and the criteria used to place creditors and shareholders in one or more classes, where applicable;

    d. the financial consequences of the plan for each class of creditors and shareholders;

e. the expected value that can be realised if the plan is put into effect;

f. the expected proceeds that can be realised from a liquidation of the assets of the debtor in bankruptcy;

g. the principles and assumptions used in calculating the values referred to in (e) and (f);

h. where the plan involves the allocation of rights to creditors and shareholders, the moment or moments at which the rights are allocated;

i. where applicable,

1. the new financing that the debtor wishes to obtain in the context of the implementation of the plan and the reasons why this is necessary; and

2. a specific transaction that the debtor wishes to enter into in the context of the implementation of the plan and which he wishes to have reviewed by the court as part of its confirmation request in accordance with Article 384;

j. the manner in which creditors and shareholders can obtain further information on the plan;

k. the procedure for voting on the plan and the time of the vote or the deadline for casting votes; and

l. the manner in which the works council or workplace representation that is set up in the debtor's business in accordance with Article 25 of the Works Councils Act[10] has been or will be asked to issue its advice.

2. The following shall be appended to the plan:

a. a properly documented statement of all assets and liabilities;

b. a list containing:

1°. the identity of the creditors and shareholders with voting rights by reference to name or, if that is not possible, by reference to one or more categories;

2°. the amount of their claim or the nominal amount of their share, and, if applicable, a specification to which extent that amount is disputed and for which amount the creditor or shareholder is admitted to the vote; and

3°. a specification of the class or classes into which they have been placed.

c. where applicable, the identity of the creditors and shareholders that are not included in the plan by reference to name or, if that is not possible, by reference to one or more categories, together with an explanation of why they are not included in the plan;

d. information on the financial position of the debtor; and

e. a description of:

1°. the nature, extent and cause of the financial problems;

2°. what attempts have been made to resolve these problems;

3°. the restructuring measures that are part of the plan and where applicable, the consequences of those measures for the employees employed by the debtor;

4°. how these measures contribute to a solution and the necessary conditions that must be fulfilled for this; and

5°. how long implementation of these measures is expected to take;

f. to the extent applicable, a written statement setting out which imperative ground exists for offering the ordinary unsecured creditors as referred to in Article 374(2) under the terms of the plan a distribution in cash that is less than 20% of the nominal amount of their claim or a right with a value that is less than 20% of the nominal amount of their claim.

3. An order in council may stipulate what other information must be included in the plan or the appended documents, how that information is to be supplied, and may also provide a form template.

Article 376 ***Stay***

1. Where the debtor has submitted to the clerk of the court a declaration as meant in Article 370(3) and has proposed a plan as meant in Article 370(1) or undertakes to propose a plan within two months, or the court has appointed a restructuring expert under Article 371, the debtor or the restructuring expert may request that the court order a stay.

2. During the stay, which may not exceed four months:

a. third parties may not enforce their rights against assets belonging to the debtor's estate or require the repossession of assets from the debtor without leave from the court, provided that those third parties have been informed that the court has ordered a stay or are aware of the preparations for a plan;

b. the court can lift attachments at the request of the debtor or the restructuring expert, if appointed; and

c. consideration of a request for a suspension of payments, a bankruptcy application submitted by the debtor, or a bankruptcy application submitted by a creditor is suspended.

3. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.

4. The court shall grant the request described in Article 376(1) if there is *prima facie* evidence that:

a. it is necessary to continue the debtor's business during the preparation of a plan and to enable negotiations on a plan to continue or to enable the debtor's business to be wound up in a controlled manner by means of a plan; and

b. it could reasonably be assumed at the time of ordering a stay that it would be in the interests of the debtor's general body of creditors and would not materially prejudice the interests of the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2).

5. If such a request is submitted by the debtor or the restructuring expert, if appointed, before the maximum period of the stay as meant in Article 376(2) has expired, the court may extend this period by a period to be determined by the court, provided that the total period including extensions does not exceed eight months. The debtor or the restructuring expert must demonstrate in the request that significant progress has been made on preparations for the plan. The latter will in any event be deemed to be the case where a request to confirm the plan as meant in Article 383(1) has been submitted.

6. In derogation from Article 376(5), the total term of the stay including extensions cannot exceed four months if:

a. the stay is requested in the context of a confidential pre-insolvency plan procedure; and

b. the debtor's centre of main interests as meant in Article 3(1) of the Regulation referred to in Article 5(3) has been moved from another Member State in the three months prior to the time of the court's first decision under this Section or on the basis of Article 42a.

7. Where the debtor has created a right of pledge under Article 3:239(1) of the Dutch Civil Code on a receivable or on the right of usufruct of a receivable, the pledgee may not issue the notice described in Article 3:239(3) of the Dutch Civil Code or receive payments or offset payments against a claim on the debtor during the stay, provided the debtor has provided adequate replacement security for that pledge.

8. Articles 241a(2)[11] and (3)[12] and 241c[13] apply *mutatis mutandis*, provided that application of Article 241a(3) relates to a term that is imposed on the debtor.

9. At the request of the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(1), the court may make the provisions as meant in Article 379 in its decision to order a stay or during the period of the stay. At the time of ordering a general stay, the court may appoint an observer as meant in Article 380 if the court determines that it is necessary to secure the interests of the creditors or shareholders.

10. The court may grant a leave as referred to in the second paragraph, under a, if it can reasonably be assumed that the third party's interests will be materially harmed by the inability to exercise the powers referred to in that paragraph.

11. If the requirements of Article 376(1) and (4) are no longer satisfied, the court shall lift the stay. The court may do so on its own initiative or at the request of the debtor, the observer if appointed, the restructuring expert if appointed, or the third parties, attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2).

12. Before taking the decision on granting the leave meant in Article 376(2)(a) or the requests meant in Article 376(5), (9) and (11), the court shall offer the debtor, the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and the third parties attaching party and creditor who submitted the bankruptcy application, as described in Article 376(2), an opportunity to express their views in a manner and within a period determined by the court.

13. Article 371(14) applies *mutatis mutandis*.

14. The request for a suspension of payments or the bankruptcy application submitted by a creditor or by the debtor itself, as meant in Article 376(2)(c), expires by operation of law as soon as the plan is confirmed by the court under Article 384. If the creditor was unaware that a plan was being prepared when it submitted the bankruptcy application, the court shall decide whether the debtor must compensate the creditor for the costs of the action.

Article 377 ***Continued use of encumbered property in the ordinary course of business***

1. A debtor who had the right to use, expend or dispose of property or to collect claims prior to the ordering of the stay as meant in Article 376 shall retain this right during the stay, provided this falls within the debtor's ordinary course of business.

2. The debtor may exercise the right described in Article 377(1) only if the interests of the third parties affected are adequately protected.

3. If the requirement of Article 377(2) is no longer satisfied, the court shall revoke or limit the exercise of the right referred to in Article 377(1) at the request of one or more affected third parties. Before taking its decision, the court shall offer the third parties affected, the debtor, the restructuring expert as meant in Article 371, if appointed, and the observer as meant in Article 380, if appointed, an opportunity to express their views in a manner and within a period determined by the court.

Article 378 Directions from the court

1. Before the plan has been put to a vote under Article 381(1), the debtor or the restructuring expert as meant in Article 371, if appointed, may request that the court make a determination on any issues that are relevant in the context of putting a plan into effect under this Section, including:

   a. the information provided in the plan or the appended documents, as well as the valuation proposed and the principles and assumptions used by the debtor, as meant in Article 375(1) (e)-(g);

   b. the class formation;

   c. the admission of a creditor or shareholder for voting purposes;

   d. the voting procedure and the period within which the vote may reasonably be held after the plan has been presented to creditors and shareholders with voting rights, or they have been notified how it can be accessed;

   e. whether, if the plan is accepted by all classes, there would be a ground for refusal as meant in Article 384(2) and (3) to prevent confirmation of the plan;

   f. whether, if the plan is not accepted by all classes, there would be a ground for refusal as meant in Article 384(2),(3) and (4) to prevent confirmation of the plan; and

   g. whether, if the debtor is a legal entity as referred to in Article 383(2), the board refuses without good reason to consent to the submission of the confirmation request.

2. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.

3. Where possible, the court shall consider requests submitted to it under Article 378(1) jointly and in a single hearing.

4. Where the court receives a request pursuant to Article 378(1) for a determination on the admission of a creditor or shareholder to the vote, the amount of the claim of the creditor with voting rights or the nominal amount of the share of the shareholder with voting rights, the court shall determine whether that creditor

or shareholder is admitted to the vote and, if so, for what amount. Article 147 applies *mutatis mutandis*.

5. Where the court is requested on the basis of paragraph 1, subsection g, to consider the board's refusal to grant the above mentioned consent and establishes that the board has no good reason to withhold such consent, the court may, upon the request of the restructuring expert, provide that its decision has the same effect as consent of the board.

6. If the court deems it necessary when taking its decision, it may appoint one or more experts to conduct an examination and issue a report of their findings, stating reasons, within a period determined by the court, that may be extended if necessary. The experts shall submit a report to the court, where it will be available for inspection by creditors and shareholders with voting rights. Article 371(7) and (8) apply *mutatis mutandis*. The court may at any time dismiss and replace an expert after having heard or properly notified him, either at his own request or on the court's initiative.

7. If information needed for the decision is lacking, the court may allow the debtor or the restructuring expert a reasonable period to produce the missing information before it takes a decision as meant in Article 378(1) and (5).

8. Before taking a decision as meant in Article 378(1) and (4), the court shall offer the debtor or the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and the creditors and shareholders whose interests are directly affected by the decision an opportunity to express their views in a manner and within a period determined by the court. If the court is asked to take a decision as meant in Article 378(4), the preceding sentence applies in any event to the creditor or shareholder referred to in Article 378(4).

9. Decisions of the court under this article are binding only on those creditors and shareholders who were given an opportunity by the court to express their views on the basis of Article 378(7).

10. Article 371(14) applies *mutatis mutandis*.

Article 379 ***Bespoke measures***

1. Where the debtor has submitted a declaration to the court as meant in Article 370(3) or the court has appointed a restructuring expert under Article 371, the court may, at the request of the debtor or the restructuring expert or on its own initiative, make such determinations or provisions as it deems necessary to safeguard the interests of the creditors or shareholders.

2. Article 371(2), first, second and fifth sentences, and Article 371(14) apply *mutatis mutandis*.

Article 380 ***Observer***

1. If the debtor prepares a plan under Article 370, a provision as meant in Article 379 may include the appointment of an observer. The observer's task is to monitor the plan process with due regard to the interests of the general body of creditors. The court appoints an observer that is sufficiently trained and has the expertise required for his tasks. As part of the appointment:

    a. the court takes into account the specifics of the case, including any cross-border elements, and the experience and expertise of the observer; and

    b. the court uses a procedure and conditions that are clear, transparent and fair.

2. The observer shall duly notify the court as soon as it is clear that the debtor will be unable to put a plan into effect under this Section or that the interests of the general body of creditors are harmed. In such circumstances, the court shall give the observer and the debtor an opportunity to express their views in a manner and within a period determined by the court and draw from it such consequences as it deems appropriate. One such consequence may be that the court appoints a restructuring expert as meant in Article 371.

3. If a request to appoint a restructuring expert as meant in Article 371 is submitted and granted by the court after the court has appointed an observer, the court shall revoke the appointment of the observer.

4. Article 371(2), first, second and fifth sentences, and Article 371(5)-(14) apply *mutatis mutandis*.

Article 381 ***Voting and acceptance***

1. The debtor or the restructuring expert as meant in Article 371, if appointed, shall make the plan available to creditors and shareholders with voting rights for a reasonable period of at least eight days before the vote, or inform them how it can be accessed, in order that they can come to an informed opinion.

2. Creditors and shareholders with voting rights are the creditors and shareholders whose rights are amended under the plan.

3. Where the debtor or the restructuring expert proposes a plan that affects rights in which most if not all of the economic interest is held by a party other than the creditor, as a result of which the position of that other party must reasonably be equated in the circumstances to that of a creditor as meant in Article 381(2), the debtor or the restructuring expert may allow that other party, rather than the creditor, to vote on the plan. In that case the provisions of this Section concerning the creditor apply to that other party.

4. Where the debtor or the restructuring expert proposes a plan that also concerns shares for which depositary receipts have been issued, the debtor or

the restructuring expert may allow the depositary receipt holder, rather than the shareholder, to vote on the plan. In that case the provisions of this Section concerning the shareholder apply to the depositary receipt holder. The same applies in respect of usufructuaries.

5. The vote on the plan takes place by class of creditors or shareholders, in accordance with the information provided in Article 375(1)(k), in a meeting held physically or electronically or in writing.

6. A class of creditors has accepted the plan if a group of creditors that together represent two-thirds of the total amount of the claims of the creditors who cast a vote in that class has voted in favour.

7. A class of shareholders has accepted the plan if a group of shareholders that together represent two-thirds of the total amount of the issued capital of the shareholders who cast a vote in that class has voted in favour.

Article 382 ***Report on the vote***

1. The debtor or the restructuring expert as meant in Article 371(1), if appointed, shall prepare a report as soon as possible and in any event within seven days after the vote, which contains:

   a. the names of the creditors and shareholders or, if that is not possible, a reference to one or more categories of creditors and shareholders that cast a vote and whether they accepted or rejected the plan, together with the amount of their claims or the nominal amount of their shares;

   b. the result of the vote; and

   c. whether the debtor or the restructuring expert intends to submit a request as meant in Article 383(1) and if so, any other information about the vote, or if applicable, the meeting at which the vote took place, that is relevant in the context of that request.

2. The debtor or the restructuring expert shall ensure that creditors and shareholders with voting rights are able to inspect the report without delay. Where the debtor or restructuring expert has submitted a request as meant in Article 383(1), it shall submit the report to the clerk of the court. The report shall be made available there for inspection by creditors and shareholders with voting rights until the court has given a decision on the request as meant in Article 383(1).

SECTION 3. CONFIRMATION OF THE PLAN

Article 383 *Confirmation hearing*

1. Where at least one class of creditors has accepted the plan, the debtor or the restructuring expert as meant in Article 371, if appointed, may submit a written request to the court to confirm the plan. If the plan seeks to amend the rights of creditors whose claims would be expected to be at least partially satisfied in a liquidation of the debtor's assets in bankruptcy, the class referred to in the preceding sentence must consist of creditors who fall within this category of creditors. If the restructuring plan has been prepared by the debtor and has been submitted by the restructuring expert to the vote of the creditors and shareholders with voting rights in accordance with Article 371(1), fifth sentence, the debtor cannot itself submit a confirmation request, but the restructuring expert will do so at the request of the debtor or on its own initiative.

2. The restructuring expert may submit a request to confirm the plan only with consent of the debtor if:

   a. the plan has not been accepted by all classes; and

   b. the debtor or the group, referred to in Article 24b of Book 2 of the Civil Code, to which the debtor belongs, runs an SME.

   Where the debtor is a legal entity, the shareholders may not unreasonably prevent the board from giving its consent.

3. Article 371(2), first, second and fifth sentences, apply *mutatis mutandis*.

4. The court shall issue a decision as soon as possible scheduling a hearing to consider the confirmation. Where the debtor submits a request to confirm a plan that has not been accepted by all classes and the court has not yet appointed a restructuring expert as meant in Article 371 or an observer as meant in Article 380, the court shall appoint an observer in the same decision.

5. The debtor or the restructuring expert shall send written notice of the decision referred to in Article 383(4) promptly to creditors and shareholders with voting rights.

6. The hearing shall be held at least eight days and no more than fourteen days after the request to confirm and the report as meant in Article 382 have been made available at the court for inspection.

7. Where the debtor or the restructuring expert seeks to terminate an agreement unilaterally under Article 373(1), the confirmation request shall also include a request seeking the court's leave to terminate that agreement unilaterally.

8. Creditors and shareholders with voting rights may submit a written request for the court to deny confirmation, stating their reasons, up to the date of the hearing as meant in Article 383(4). Until that time, the counterparty to the agreement as meant in Article 383(7) may submit a written request, stating reasons, for the court to deny the requested leave to terminate as meant in Article 383(7).

9. A creditor, shareholder or counterparty as meant in Article 383(8) may not invoke a ground for refusal if it did not raise an objection to that effect with the debtor or the restructuring expert, if appointed, promptly after it discovered or should reasonably have discovered the possible existence of that ground for refusal.

Article 384 ***Confirmation criteria***

1. Where the court has jurisdiction to hear the request to confirm, it shall issue its reasoned judgment as soon as possible granting this request and, if applicable, a request for leave to terminate an agreement as meant in Article 383(7), unless one of the grounds for refusal as meant in Article 384(2)-(5) arises. If, in accordance with Article 383(1), third sentence, the restructuring expert referred to in Article 371 has, in addition to a confirmation request relating to a plan that he has prepared himself, also submitted a confirmation request for a plan prepared by the debtor, then the court first assesses the confirmation request for the latter plan, unless the restructuring expert submits a request supported by the debtor for the requests to be dealt with in reverse order or if all classes have only voted in favour of the former plan. The court will only deal with the second confirmation request if it appears that this confirmation request must be rejected.

2. The court shall deny a request to confirm the plan if:

   a. the state of the debtor as meant in Article 370(1) does not exist;

   b. the debtor or the restructuring expert have not complied with all of their obligations to creditors and shareholders with voting rights, as meant in Articles 381(1) and 383(5), unless the creditors and shareholders in question confirm that they accept the plan;

   c. the plan or the appended documents do not contain all of the information prescribed in Article 374, the class formation does not meet the requirements of Article 374, or the voting procedure did not comply with Article 381, unless the shortcoming could not reasonably have led to a different outcome of the vote;

   d. a creditor or the shareholder should have been admitted to the vote on the plan for a different amount, unless that decision could not reasonably have led to a different outcome of the vote;

   e. performance of the plan is not adequately safeguarded;

f. it is stated in the plan in accordance with Article 375(1), under i, that the debtor:

1. wants to obtain new financing, while it is reasonably likely that this is not necessary for the implementation of the plan or the interests of the joint creditors will be materially harmed as a result, or

2. wants to enter into a specific transaction, while it is reasonably likely that it is not immediately necessary for the implementation of the plan or that it substantially harms the interests of the joint creditors;

g. the plan was procured by deception, by favouring one or more creditors or shareholders with voting rights or by other unfair means, irrespective of whether it was with the cooperation of the creditor or any other party;

h. the salary and disbursements for the restructuring expert, expert or observer instructed or appointed by the court under Article 371, 378(6) and 380 respectively have not been paid or no security for payment has been provided; or

i. other reasons militate against confirmation.

3. The court may refuse to confirm the plan, at the request of one or more creditors or shareholders who rejected the plan or who were wrongly excluded from the vote, if there is *prima facie* evidence that these creditors or shareholders will be worse off under the plan than they would have been in a liquidation of the debtor's assets in bankruptcy.

4. The court shall refuse to confirm a plan that was not accepted by all classes, at the request of one or more creditors or shareholders who rejected the plan and who were placed in a class that did not accept the plan or who were wrongly excluded from the vote and should have been placed in a class that did not accept the plan if:

a. a class of creditors as referred to in Article 374(2) is offered a distribution in cash that is less than 20% of the nominal amount of their claim or a right with a value that is less than 20% of the nominal amount of their claim, whilst no imperative ground for doing so has been demonstrated;

b. the distribution of the value realised with the plan deviates to the disadvantage of the class that did not accept the plan from the ranking that applies upon enforcement against the debtor's assets under Book 3, Title 10 of the Dutch Civil Code, any other law or instrument based upon it or under a contractual arrangement, unless there are reasonable grounds for such deviation and the interests of the said creditors or shareholders are not prejudiced by it;

c. the plan does not give said creditors, not being creditors as referred to in subsection d, a right to opt for a cash payment in the amount they would have expected to receive in cash in a liquidation of the debtor's assets in bankruptcy, or

d. the said creditors have priority arising from a right of pledge or mortgage as referred to in Article 287(1) of Book 3 of the Dutch Civil Code and have granted the debtor financing on a commercial basis and are offered under the terms of the plan shares or depositary receipts of shares without the right to opt for a distribution in a different form.

5. At the request of the counterparty to the agreement, the court shall deny the request for leave to terminate the agreement as meant in Article 383(7) on the ground as meant in Article 384(2)(a).

6. Article 378(6) applies *mutatis mutandis*.

7. Before taking the decision as meant in Article 384(1), the court shall offer the debtor, the restructuring expert, if appointed, the observer as meant in Article 380, if appointed, and creditors and shareholders with voting rights or the counterparty, where they have submitted a request as meant in Article 383(8) for the court to deny the request for confirmation or the request for leave to terminate the agreement, an opportunity to express their views in a manner and within a period determined by the court.

8. Article 371(14) applies *mutatis mutandis*.

SECTION 4. THE CONSEQUENCES OF CONFIRMATION

Article 385 *Effects of the plan*

The confirmed plan is binding on the debtor and all creditors and shareholders with voting rights. Where the vote on the plan was not cast by the creditor or shareholder but by a third party in accordance with Article 381(3) or (4), the plan is nevertheless binding on the creditor or shareholder.

Article 386 *Enforceable title*

For creditors with voting rights whose claims are undisputed by the debtor, the judgment confirming the plan constitutes an enforceable title against the debtor and against the persons that have become a party to the plan as guarantors, insofar as the creditors obtain a monetary claim under the plan.

Article 387 ***Failure to comply with the plan***

1. Every failure by the debtor to comply with the plan constitutes a breach and makes the debtor liable to creditors or shareholders with voting rights for the resulting losses, unless the breach is not attributable to the debtor. Article 75 and Book 6, Section 10, Title 1 of the Dutch Civil Code apply *mutatis mutandis*.

2. The plan may exclude rescission of the plan. Where the plan does not contain a provision to that effect, Article 165 applies *mutatis mutandis*.

EINDNOTEN

1 Article 42 of the Bankruptcy Act currently reads:
1. The bankruptcy trustee may, for the benefit of the estate and by a statement not requiring legal formality, annul each legal act which the debtor performed without obligation prior to the declaration of bankruptcy where the debtor was or should have been aware that the act would result in being prejudicial to the creditors. Article 3:50(2) of the Civil Code does not apply.
2. A legal act, other than for no consideration, which is either multilateral or unilateral and which concerns one or more specific parties, may only be annulled on the grounds that it causes prejudice where the parties, with or in respect of whom the debtor performed the legal act, were or should have been aware that the act would result in being prejudicial to creditors.
3. Where a legal act for no consideration is annulled on the grounds that it causes prejudice, this annulment will have no effect in respect of a beneficiary who was neither aware nor should have been aware that the legal act could result in being prejudicial to the creditors, to the extent he shows that he had not benefited from the legal act at the time of the declaration of bankruptcy.

2 Reference is made here to the European Insolvency Regulation 2015/848.

3 Article 3 of the Dutch Code of Civil Procedure reads as follows:
The Dutch courts have jurisdiction in cases in which an application has been submitted, except for cases as meant in Articles 4 and 5, where:
a. either the applicant or, where there are multiple applicants, one of them, or one of the interested parties specified in the originating document, has its domicile or habitual residence in the Netherlands;
b. the application relates to an action in which a claim is or will be submitted in respect of which the Dutch courts have jurisdiction; or
c. the case is otherwise sufficiently connected to the Dutch legal system.

4 Articles 262 and 269 of the Dutch Code of Civil Procedure read as follows:
Article 262
Unless the law provides otherwise, the court of the domicile of the applicant or of one or more of the applicants, or of one of the interested parties named in the originating document, has jurisdiction, or, if there is no such known domicile in the Netherlands, the court of the actual abode of one of them.
Article 269
Where Articles 109(1) and 262 to 268 inclusive do not confer jurisdiction on a court, the District Court of The Hague has jurisdiction.

5 Article 2:24b of the Dutch Civil Code reads as follows:
A group is an economic unit in which legal persons and partnerships are united in one organisation.
Group companies are legal entities and partnerships which are united in one group.

6 Article 160 of the Bankruptcy Act reads as follows:
Notwithstanding the plan, the creditors shall retain all their rights against any guarantors and other co-debtors of the debtor. Any rights which they may have in respect of property of third parties shall continue as if no plan had been made.

7 Reference is made here to the European Insolvency Regulation 2015/848.

8 Reference is made here to the European Insolvency Regulation 2015/848.

9 Articles 395a and 396 of Book 2 of the Dutch Civil Code refer to small enterprises with a balance sheet total less than EUR 6 million and a net annual turnover less than EUR 12 million.

10 *Wet op de ondernemingsraden*.

11 Reference is made here to a notice of enforcement. Article 241a(2 reads as follows:
The District Court may restrict its decision to certain third parties, and it may attach specific conditions to its decision. The District Court and the President of the District Court may attach conditions to the authorisation they grant to a third party in exercising its rights under this authorisation.

12 Article 241a(2) provides that the court may limit the stay to one or more specific third parties and attach conditions to its order to grant or to grant leave from the stay. Article 241a(3) reads as follows:
Where a third party has stipulated a reasonable time period to the bankruptcy trustee, this time period will be suspended while the action is stayed.

13 This article concerns the ability of third parties to prevent the Dutch Revenue Service (*ontvanger*) from recovering its claims against the debtor from their property.