

## Update on Dutch partnerships

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The Dutch Supreme Court recently delivered two important and interesting judgments in the matter of partnerships. The first judgment relates to the consequences of bankruptcy of a general partnership or a limited partnership for its partners. The second judgment pertains to a matter that has kept opinions in case law and legal literature divided for a long time, namely whether or not an acceding partner is liable for debts of the partnership going back to a moment in time prior to his or her accession.

*Supreme Court, February 6, 2015, ECLI:NL:HR:2015:251 (VDV Totaalbouw)*

In the VDV Totaalbouw judgment, the Supreme Court receded from its established case law in which it was ruled that the bankruptcy of a general partnership (*vennootschap onder firma* or *VOF*) or a limited partnership (*commanditaire vennootschap* or *CV*) always and necessarily leads to the bankruptcy of its partners. One of the reasons specified by the Supreme Court is that the Bankruptcy Act (*Faillissementswet*) gives no cause for such interpretation. The names of the partners should indeed be mentioned in the petition for bankruptcy of the *VOF* or *CV*, but this does not mean that this petition also counts as an application for the bankruptcy order against the individual partners. In addition, according to the Supreme Court, declaring a partner bankrupt without a petition to this end and without having inspected if the relevant partner can be declared bankrupt is contrary to the European Convention on Human Rights. The Supreme Court further considered that the partner, in contrast to the partnership itself, may have sufficient - private - assets to satisfy both the creditors of the partnership as well as his or her private creditors. It is also possible that a partner has a receivable in private that can be offset against the claim of the applicant, whereas the *VOF* or *CV* does not.

The Supreme Court furthermore held that the rule that the partners are always declared bankrupt along with the partnership is no longer appropriate because of the introduction of the Debt Rescheduling (Private Individuals) Act (*Wet schuldsanering natuurlijke personen*). The application of the debt rescheduling scheme is open to private individuals with business debts. This means that such partners who have filed a request under the Debt Management Act cannot be automatically declared bankrupt when the *VOF* or *CV* is declared bankrupt.

An item for consideration following from the judgment is that if a creditor wants to realize the bankruptcy of the partners in addition to the bankruptcy of the *VOF* or *CV*, the bankruptcy order should be requested separately against each of them. The judge should then examine with regard to each of the partners separately whether the requirements for bankruptcy are met. The new rule of law may have as a result that a *VOF* or *CV* is declared bankrupt, but its partners are not.

*Supreme Court, March 13, 2015, ECLI:NL:HR:2015:588 (Carlande Dienstverlening CV)*

In the Carlande Dienstverlening judgment, the Supreme Court gave a ruling for the first time on the question whether a partner of a *VOF* and a general partner of a *CV* are also jointly and severally liable for debts of the partnership that arose prior to their joining as partners. With this judgment, the Supreme Court has made an end to the previous uncertainty in case law and legal literature on this subject by answering this question affirmatively. Such joint and several liability will also apply to the limited partner of the *CV* if the limited partner performs acts of management in the partnership. The limited partner will then become jointly and severally liable for the debts of the *CV* that arose before the limited partner acted contrary to the statutory ban on performing acts of management relating to limited partners (*beheersverbod*). The Supreme Court is of the opinion that the interests of the acceding (general) partner are adequately met since, before joining, the partner may insist on inspecting the debt position of the partnership or may be provided with the opportunity to do research accordingly. Furthermore, the partner may stipulate guarantees or make arrangements regarding the obligation to contribute to any existing debts of the partnership.