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Reform of Partnership Law in the Netherlands: Proposal for Liability and Restructuring

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Introduction

Modernisation of Dutch partnership law has proven not to be an easy ride and has given rise to much debate. After ten years of drafting and amending the proposal for modern partnership law and only an approval from the First Chamber of the States General away from a new Act, the draft bill was suddenly withdrawn in 2011.¹ At the eleventh hour, it was deemed to be unfit for its purposes. The Minister of Security and Justice substantiated the action by referring to the inability of the proposed legislation to achieve its primary objective of the facilitation of entrepreneurs. Small- and medium-size enterprises in particular seemed to give little support to the draft bill. It was perceived as putting a too large an administrative burden on them, a complaint that was aired by their national representatives in a so-called 'emergency letter'.² After so many years of legislative efforts, the withdrawal of the draft bill was a surprise for many. The legal community was disconcerted by the withdrawal while as a result it was still left with incomplete, inconsistent and unclear partnership law dating back to 1838.

In 2012, a voluntary informal working group consisting of professors, practitioners and representatives of Dutch enterprises (hereinafter: Working Group) picked up the gauntlet on its own initiative and aimed at designing a new draft proposal that would take away bottlenecks, fill gaps, and modernize and innovate the old rules. After four years of hard work and discussions, the Working Group presented its first draft to

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¹ *Kamerstukken I* 2010/11, 31 065, C.

² *Kamerstukken I* 2010/11, 31 065, B, p. 2 and a letter from the national representatives of entrepreneurs/corporations (MKB Nederland and VNO-NCW) to the chair and members of the committee for Justice of the Second Chamber of the States General dated 15 October 2008: *Kamerstukken II* 2008/09, 31 065, nr. 14, appendix 2.

the legal community. During a conference in the spring of 2016, it opened up the possibility to receive feedback from speakers and the audience on the full spectrum of subjects covered by the group's proposal. This resulted in several amendments. The Working Group presented the final proposal³ to the former Minister of Security and Justice in the fall of 2016, who indicated that it would be put on the agenda for modernizing Dutch company law.⁴ Since then it has been quiet. That is, however, not really surprising as in the meantime two Ministers of Security and Justice consecutively stepped down from office followed by a 225 day cabinet formation in 2017, the longest such process in the history.⁵ With a new cabinet in place and two ministers instead of one responsible for the Ministry of Justice and Security,⁶ partnership law will hopefully be back on the agenda soon. It is expected that the proposal of the Working Group will be carefully examined when a new draft bill has been written.

In this article three elements of the Working Group's proposal for new partnership law (hereinafter: Proposal) will be discussed, which in Dutch law are quite unique and innovative compared to the current rules:

- (i) the possibility of having a separate legal personality;
- (ii) the liability rules and a restricted possibility to apply a limited liability rule;
- (iii) the availability of restructuring options.

Following the discussion of the rules in relation to different Dutch partnership types, the themes of liability on the one hand and restructuring on the other hand will be explored, followed by some concluding remarks. For a good understanding of Dutch partnership law and the Proposal, an introduction of the three types of Dutch partnerships and the current applicable rules to partnerships will be presented below.

Rules Applicable to Partnerships

The rules applicable to Dutch partnerships can be found in many different parts of the law. Applicable rules can be found in several books of the Dutch Civil Code (hereinafter: DCC) such as Book 3 on general property law, Book 6 on the law of obligations, Book 7 on the law of service agreements and Book 7A on the law of special agreements, the Commercial Code (*Wetboek van Koophandel*) (hereinafter:

³ Werkgroep personenvennootschappen, 'Modernisering Personenvennootschappen: Rapport van de Werkgroep Personenvennootschappen', 26 September 2016. <www.rijksoverheid.nl/documenten/rapporten/2016/09/26/modernisering-personevennootschappen> accessed 27 June 2018.

⁴ Letter of the minister of Security and Justice dated 9 December 2016, 'Voortgang modernisering ondernemingsrecht' <www.rijksoverheid.nl/documenten/kamerstukken/2016/12/09/tk-voortgang-modernisering-ondernemingsrecht> accessed 27 June 2018.

⁵ 'Duur kabinetsformaties sinds 1946' (Parlement & Politiek, 2017)

<www.parlement.com/id/vhnnmt7mnnzb/duur_kabinetsformaties_sinds_1946> accessed 27 June 2018.

⁶ The name has changed from Ministry of Security and Justice to Ministry of Justice and Security.

CC) and the rules relating to the Dutch Commercial Register (*Handelsregisterwet 2007*: Dutch Commercial Register Act 2007, hereinafter: DCRA 2007 and *Handelsregisterbesluit 2008*: Dutch Commercial Register Resolution 2008, hereinafter: DCRR 2008). The diversity of sources of law can lead to a myriad of applicable rules giving rise to concurrence difficulties, some of which have been solved by case law over time. In comparison to rules applicable to limited liability companies, which are neatly collected in just one book of the DCC (Book 2) and modernized in 2012, partnership law currently demands more effort to understand and apply. One of the pillars of the Proposal of the Working Group was to put all the rules together in one act to add clarity and make it less complicated.⁷ What follows will discuss whether the Working Group succeeded in this objective with respect to the three central elements of this article: legal personality, liability, and restructuring.

Types of Partnerships under current law

In Dutch partnership law three types of partnerships exist: (1) the partnership (*maatschap*); (2) the partnership under common firm, also called the general partnership (*vennootschap onder firma*); and (3) the limited partnership (*commanditaire vennootschap*). The professional partnership and the general partnership will be discussed more extensively than the limited partnership as it does not fit the scope of this article to elaborate in more detail on the rules of the limited partnership.

Maatschap

Definition of a Professional Partnership

The *maatschap* is the basic structure of Dutch partnerships and can be public or silent. A public *maatschap* can only be used by persons that perform professional activities. A silent *maatschap* can be used for both professional and non-professional activities which includes an incidental collaboration which does not necessarily have to have a professional or commercial character.⁸ A partnership is considered silent when it does not take part in legal transactions under a chosen name in a way that is recognisable to third parties.⁹ In this article we only discuss public partnerships. When we refer to the public *maatschap* we use the term ‘professional partnership’.

The law describes a professional partnership as an agreement with which two or more persons have engaged themselves to bring together means with the purpose of sharing the benefits that may result therefrom.¹⁰ This definition is incomplete as

⁷ Werkgroep Personenvennootschappen (n 3) 9.

⁸ Asser/Maeijer & Van Olfen 7-VII 2017/9.

⁹ HR 5 November 1976, NJ 1977/586 (*Moret Gudde Brinkman*).

¹⁰ Art 7A:1655 DCC.

there are more requirements for the qualification as a professional partnership. In addition to the requirements of (1) an agreement between two or more parties, (2) contributions by each of the parties, and (3) sharing of the benefits, it is also necessary that there is (4) an active collaboration between the parties aimed at a common goal in order to generate commercial benefits.¹¹ Within the collaboration partners (which can be natural persons and legal persons) must have a more or less equivalent position (*affectio societatis*) without a hierarchical relationship.¹² This means that an employment relationship between the partnership and a partner is impossible. Each partner is bound to provide the professional partnership with capital, goods, use of goods or labour (contribution).¹³ Partners provide these contributions in order to use them to generate commercial benefits which is seen as a distinctive feature of a partnership in comparison with other collaborations.¹⁴ Partnerships can be formed even when collaborating parties are not aware of this or in the situation that the partners have explicitly stated in their agreement that they do not intend to form a partnership, as the existence of the partnership will be determined by meeting the aforementioned objective criteria.¹⁵ However, it has been argued that in this last situation judges should approach a requalification with caution on the basis of party autonomy.¹⁶

A 'public' professional partnership presents itself under a common name and participates in society under this name. When the professional partnership has an enterprise as defined in the DCRR 2008,¹⁷ the professional partnership has to be registered with the Commercial Register.¹⁸ According to case law, professional partnerships do not have independent standing but the common name used in society by the partners of the partnership can be used for the service of process.¹⁹ Some are of the opinion that professional partnerships do have standing because they have a separate patrimony.²⁰ As mentioned, public professional partnerships can only perform professional activities. When non-professional business activities are performed under a common name, a general partnership exists and different (liability) rules may apply. The fact that professional activities are not defined by

¹¹ Asser/Maeijer & Van Olffen 7-VII 2017/6.

¹² HR 15 March 2013, ECLI:NL:HR:2013:BY7840 (*Biek Holdings*).

¹³ Art 7A:1655 DCC and art 7A:1662(1) DCC.

¹⁴ HR (Third chamber) 8 July 1985, NJ 1986/385 and Asser/Maeijer 5-V 1995/12.

¹⁵ HR 2 September 2011, ECLI:NL:HR:2011:BQ3876 (*Astense Dierenartsenpraktijk*).

¹⁶ ChrM Stokkermans, *Sleutels voor personenvennootschapsrecht*, Uitgave vanwege het Instituut voor Ondernemingsrecht (Wolters Kluwer 2017) 69, 71.

¹⁷ Art 2(1) DCRR 2008.

¹⁸ Art 5 sub a DCRA 2007 jo. 2(1) DCRR 2008.

¹⁹ *Moret Gudde Brinkman* (n 9) and *Biek Holdings* (n 12); ChrM Stokkermans (n 16) 124-125, AJSM Tervoort, *Het Nederlandse personenvennootschapsrecht*, serie Recht en Praktijk (Wolters Kluwer 2015) 258; Groene Serie Personenassociaties (Tervoort) paragraaf 3.7.1 (28/10/2017); and Asser/Maeijer & Van Olffen 7-VII 2017/129.

²⁰ Asser/Maeijer & Kroeze 2-I* 2016/66 and K Teuben, 'Procederen door en tegen personenvennootschappen' (2009) 11 MvV 269.

law in combination with explanatory notes that are not clear in their explanations, renders it difficult to make a clear distinction between professional and non-professional activities.²¹ In partnership literature, certain lists of activities have been made to categorize them but a grey area remains. For the activities that fall within that grey area, common customary societal opinion should determine whether an activity belongs to the category of professional or non-professional activities.²²

Lack of Legal Personality; Separate Patrimony

Traditionally, Dutch partnerships do not have separate legal personality and therefore cannot own property themselves.²³ A complicated regime of property law applies. Each partner acquires a share in the ownership of all the contributions. Together this joint ownership forms the equity of the professional partnership. In the event of changes in the partner base, the partner who exits needs to transfer its share in the jointly owned goods to the remaining partners whereas on the entry of a new partner a share in the jointly owned goods needs to be transferred to him/her. If the partners want to change the partnership into another legal form, for example into a private limited liability company, a new company has to be incorporated and the jointly owned goods need to be transferred by the partners to this company. In order to transfer shares in the goods, delivery requirements must be met, which may vary per good to be delivered.²⁴ For example, the transfer of real estate requires a notarial deed followed by registration of the transfer with the Land Register.²⁵ Notarial intervention is also required for the transfer of registered shares in the capital of a Dutch private²⁶ or public²⁷ limited liability company. Due to various delivery

²¹ IS Wuisman, 'Naar een solide en gerechtvaardigde basis van het personenvennootschapsrecht in het kader van beroep & bedrijf en (beperkte) aansprakelijkheid', in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 33-57; IS Wuisman, 'Toekomstige soorten personenvennootschappen: If it ain't fair, fix it!' (2017) 1 TvOB 9; Asser/Maeijer 5-V 1995/19, Asser/Van Olffen 7-VII* 2010/19, AL Mohr / VAEM Meijers, *Van personenvennootschappen*, (Kluwer 2013) 74; AJSM Tervoort (n 19) 48, 49, JB Huizink, *Contractuele samenwerkingsvormen in beroep en bedrijf* (Kluwer 2011) 21; BF Assink | WJ Slagter, *Compendium Ondernemingsrecht*, Deel (II), (Kluwer 2013) 1876; JJA Hamers en LPW van Vliet, *Inleiding Personenvennootschappen* (Boom Juridische uitgevers 2012) 59; ChrM Stokkermans, 'Rechtsvormkeuzevrijheid in beroep en bedrijf' (2016) WPNR 405.

²² Asser/Maeijer & Van Olffen 7-VII 2017/19 and AJSM Tervoort (n 19) 49.

²³ Asser/Maeijer & Van Olffen 7-VII 2017/13 and 14.

²⁴ Art 3:96 DCC.

²⁵ Art 3:89 DCC.

²⁶ Art 2:196 DCC.

²⁷ Art 2:86 DCC. An exception applies for the transfer of registered shares in a public company whose shares or depository receipts for shares are admitted to a regulated market or multilateral trading facility as meant in art 1:1 of the Financial Supervision Act, or to a system comparable with such regulated markets or multilateral trading facilities in a State that is not a EU Member State, or whose shares or depository receipts for shares, as reasonably may be expected, will be admitted soon to such markets. Pursuant to art 2:86c DCC the transfer of a registered share in the capital of such a public company requires a (notarial or private) deed, drawn up for this purpose, and in addition, except when the company itself is a party to the juridical act, a written acknowledgement by the company of the transfer.

formalities that have to be complied with in order to transfer (shares in the) jointly owned goods, the entry or exit of partners and also restructuring of the partnership under current Dutch partnership law is rather cumbersome.

Although the contributions of the partners and the benefits that have been generated by the partnership are not property of the professional partnership as a stand-alone entity, the assets committed to the professional partnership are insulated from claims by creditors of the individual partners. The right to seize property is exclusive to professional partnership creditors as it is a separate patrimony (*afgescheiden vermogen*).²⁸ Private creditors of the partners cannot take recourse on the shares that these partners have in the assets belonging to this patrimony. Only when a professional partnership has been dissolved and the individual claims on the assets that remain after all creditors of the professional partnership have been paid, have been transferred to each partner, can the creditors of the individual partners assert their claims to those assets.

Representation

In the case of a professional partnership, the partners do not automatically have the right to represent the other partners. They need a proxy (*volmacht*) which could be incorporated in the partnership agreement.²⁹ Within the scope of this ‘*volmacht*’ as required by partnership law falls the representation authority based on the appointment as director of the partnership.³⁰ When a partner represents the other partners unauthorized, (s)he will bind him/herself and not the partnership (i.e. the collective of partners)³¹, unless the partnership has caused false impressions about the authority of the partner to represent the partnership (*‘toerekenbare schijn’*)³², or confirmed the act (*‘bekrachtiging’*)³³ or when the partnership benefits from the act (*‘baat’*)³⁴. The rule that the partner will only bind him/herself, is a deviation from the general rule under agency law.³⁵ The general rule is that when an agent represents a principal unauthorised and the principal has not confirmed to be bound by the act, the agent will under the general rule not bind him/herself. S(he) will be liable vis-à-vis the third party for the damage that arises because the intended legal act is not

²⁸ This follows from jurisprudence of the Supreme Court of the Netherlands: HR 26 November 1897, W 7047 (*Boeschoten/Besier*); HR 14 March 2003, ECLI:NL:HR:2003:AF4593 (*Hovuma/Spreuwenberg*); *Biek Holdings* (n 12).

²⁹ Art 7A:1681 DCC.

³⁰ Asser/Maeijer 5-V 1995/115 and Asser/Maeijer & Van Olffen 7-VII 2017/110.

³¹ Art 7A:1681 DCC. When two or more partners but not all partners have unlawfully represented the other partners, the partners who acted unauthorized are bound to the third party for equal parts on the basis of partnership law: Asser/Maeijer & Van Olffen 7-VII 2017/115. If they have not acted as partners when they entered into the agreement, the general rules of the law on obligations apply.

³² Art 3:61(2) DCC.

³³ Art 3:69 DCC.

³⁴ Art 7A:1681 DCC.

³⁵ Asser/Maeijer & Van Olffen 7-VII 2017/109 and ChrM Stokkermans (n 166) 97.

enforceable, unless the agent has informed the third party that (s)he is not authorised to act or when the third party knew or should have known that the agent was not authorised to act.³⁶ The deviation of the general rule is based on the idea that when the partner acts, (s)he does not act to only bind the other partners but also him/herself as (s)he is part of the collective of partners.³⁷

Liability and the Professional Partnership

Liability rules that may be applicable to the professional partnership and its partners can be found in different parts of the law. Liability related to agreements such as performance under the agreement and liability for contractual breach can be found in partnership law, the law on obligations, and the law on service agreements. Liability on the basis of tort can be found in partnership law as well as in the law of obligations. A 'recent' case of the Supreme Court, *Biek Holdings*, clarified some of the concurrence issues relating to the possible diversity of legal grounds used for the liability claims and the difference in associated degree of liability. Furthermore, it identified which partners can be held personally liable with regard to the different legal grounds.³⁸

Liability on the Basis of Partnership Law versus the Law on Obligations

The liability rules applicable to the professional partnership included in partnership law can be found in art 7A:1679-1681 DCC. In 2013, the Supreme Court of the Netherlands confirmed for the professional partnership its earlier judgments regarding the general partnership which made clear that in a case obligations of the partnership arise the plaintiff has 'two' claims: one against the partnership which is the collective of partners in their partnership relation and the second against each of the partners personally (which in reality would mean that the plaintiff has more than two claims as there would be two or more partners).³⁹ These are 'two' separate claims.⁴⁰ Third parties have a free choice as to which claim to assert and in which order; there is no subsidiarity.⁴¹

³⁶ Art 3:70 DCC. See also: Asser/Kortmann 3-III 2017/92 and 97.

³⁷ AL Mohr / VAEM Meijers (n 21) 96.

³⁸ *Biek Holdings* (n 12).

³⁹ *ibid.*

⁴⁰ *Moret Gudde Brinkman* (n 9).

⁴¹ AJSM Tervoort (n 19) 135, BF Assink & AJP Schild, 'Opnieuw een witte vlek in het Nederlandse personenvennootschapsrecht ingevuld door de Hoge Raad' (2015) WPNR 632 and GJH van der Sangen, 'Ontbinding en vereffening bij persoonsgebonden ondernemingsvormen', in MJGC Raaijmakers & GJH van der Sangen, *Herziening persoonsgebonden ondernemingsvormen. Enkele kanttekeningen bij het wetsvoorstel tot invoering van titel 7.13 BW* (Boom Juridische uitgevers 2003) 129. Tervoort is of the opinion that in highly exceptional circumstances, the principle of reasonableness and fairness could request that the partnership should be engaged in litigation first before a claim is asserted to one of the partners personally. Van der Sangen argues that in case there has been no attempt to receive payment from the partnership, starting litigation against the partner could be in violation of the principle of

a. *Claim against the professional partnership*

With respect to the first claim, one must litigate against the partners of the professional partnership that are partners at the time of the issuance of the subpoena.⁴² This can either be done by (1) including the names of all the partners in the subpoena or by (2) including the professional partnership's name if its partners clearly carry on activities under that name.⁴³ If one uses the first option but accidentally forgets to include a partner, the judge has the authority to summon this partner to appear.⁴⁴ The latter option is introduced by the Supreme Court for practical reasons as when the partnership has many partners it is rather cumbersome to include the names of all the partners. After including the partnership's name in the subpoena, all partners at the time of the issuance of the subpoena are 'automatically' party in the proceedings (and not the partnership as a separate entity) and can then be ordered to appear at the proceedings. A judgement against the partnership can be executed against the separate patrimony of the partnership.⁴⁵ Another aspect of the 'two' claims doctrine is the fact that partners cannot use personal defences against the claim vis-à-vis the partnership.

b. *Claims against the partners personally*

With respect to the second claim the (extent of the) personal liability depends on whether the obligation is divisible and whether the claim requests performance under an agreement or is based on a contractual breach, on tort or on another obligation arising from law.

i. *Performance under an agreement*

When the obligation concerns performance under a contractual agreement which has been entered into by the partnership⁴⁶ and this performance is divisible such as the payment of a sum of money, each partner is bound to execute this performance for

reasonableness and fairness. A judgement of a lower court that did apply subsidiarity: Rb Rotterdam 9 November 2016, ECLI:NL:RBROT:2016:8480.

⁴² *Biek Holdings* (n 12).

⁴³ *Morret Gudde Brinkman* (n 40).

⁴⁴ Art 118 Law of Legal Procedure.

⁴⁵ *Biek Holdings* (n 12).

⁴⁶ This means that the partners collectively have entered into the contract as partners of the partnership, or directors of the partnership who are authorized to act on the basis of the partnership agreement have entered into the contract or when the collective of partners has been validly represented by one or more of the partners on the basis of a proxy, or when the partnership is bound on the basis of having caused false impressions about the authority of the partner to represent the partnership ('*toerekenbare schijn*'), confirmation ('*bekrachtiging*') or benefit ('*baat*'): Asser/Maeijer & Van Olffen 7-VII 2017/115 and AL Mohr / VAEM Meijers (n 21) 110.

an equal share on the basis of partnership law, even when the share of one of these partners in the professional partnership is less or smaller than that of the others.⁴⁷ It is possible to deviate from this statutory liability rule when entering into an agreement with creditors, as a result of which for instance each of the partners is bound in proportion to a partner's real share in the professional partnership or in full instead of in equal shares.⁴⁸ Partners are not allowed to decide on an external liability arrangement without the consent of the third parties involved.

When the obligation is non-divisible, such as an obligation to act, the partners are jointly and severally liable on the basis of the general rule of the law on obligations.⁴⁹ This means that in the latter situation partnership law does not derogate from the law on obligations.⁵⁰

ii. Breach of contract

When the partnership performs a breach of contract, it may be held liable for this breach. This liability is a liability to pay legal damages.⁵¹ In addition to the partnership itself, partners may be held personally liable for the damages arising out of a contractual breach for equal parts.⁵² This means that in case of a breach of contract the liability rule included in partnership law derogates from the law on obligations as in the law on obligations a provision exists that applies to payment of damages arising out of contractual breach (as well as out of tort) which rules that when each of two or more parties have the obligation to pay for the same damage, they are jointly and severally liable for the damage.⁵³

The Supreme Court ruled that persons who were partners at the moment the professional partnership's liability for the obligation (*schuld*) arose, can be held liable for that obligation.⁵⁴ Partners who joined the partnership can thus only be

⁴⁷ Art 7A:1679-1680 DCC.

⁴⁸ Art 7A:1680 DCC.

⁴⁹ Art 6:6(2) DCC.

⁵⁰ Asser/Maeijer & Van Olffen 7-VII 2017/115, AJSM Tervoort (n 19) 136-137.

⁵¹ Art 6:74 DCC.

⁵² Art 7A:1679-1681 DCC and *Biek Holdings* (n 12). See also: Asser/Maeijer & Van Olffen 7-VII 2017/115.

⁵³ Art 6:102 DCC. It has been argued that the personal liability for the breach of contract should not fall within the scope of the liability rules included in partnership law that create personal liability for the partners for equal shares. In this view this liability should be based on the liability rules included in the law on obligations because the situation could exist that certain partners that would be liable under partnership law would not be party to the agreement and could therefore not be reproached for the breach of contract: WJM van Veen, 'De aansprakelijkheid van de (toegetrede) vennoot voor verbintenissen van de vennootschap. Bedenkingen bij 'Carlande' en 'Biek Holdings' (2015) *Ondernemingsrecht* 370.

⁵⁴ *Biek Holdings* (n 12). The Supreme Court, however, did not indicate in the judgment when the obligation arises. It follows from other case law not related to partnership liability, that the moment that the obligation arises is not necessarily the same moment that the breach of contract has taken place, as it requires damages that needs to be incurred; this does not necessarily coincide with the moment of the act

liable for obligations that arise after they entered.⁵⁵ These obligations could however depend on agreements (obligations) that have been entered into before they joined the partnership. The contract can be concluded before they were part of the partnership but the obligation to pay for damages can arise after joining. This means that they can be liable for a breach of contract although they are not party to the particular agreement that is the source (primary obligation) for the obligation to pay for damages (secondary obligation). The Supreme Court has explicitly stated that there are no other requirements for the personal liability of these partners.⁵⁶ With this rule the Supreme Court has introduced a form of 'strict' liability. Different views exist whether this is in line with the wording of the liability rules included in partnership law. Some argue that a partner can only be bound by acts for which (s)he gave a proxy or by acting him/herself in name of the partnership. A person who enters the partnership will not have done so for existing partnership's obligations nor for obligations that derive from law.⁵⁷ Others argue that the partners who join the partnership should be held liable for obligations that exist before the joining similar to the partners of a general partnership.⁵⁸ This is based on the argument that it would be in line with the wording of the liability provisions in partnership law (art 7A:1679, 1680 and 1682 DCC) and it would provide protection for creditors in case the separate patrimony of the partnership is not sufficient to cover the damage.⁵⁹ Personal liability of the partners will remain after the partner exits the partnership for the duration of the standard limitation period of five years starting the day after the day on which the aggrieved party becomes known with the damage and with the person who is liable for this damage and in any case after twenty years after the event that caused the damage.⁶⁰

iii. Tort

When the basis for liability is tort⁶¹, the tortious act committed by a partner while performing professional activities needs to be attributed to the partnership. The leading doctrine is that an act could be attributed to the professional partnership on

itself. See case law mentioned in: ChrM Stokkermans, 'Ontwikkelingen in het personenvennootschapsrecht' (2015) WPNR 185.

⁵⁵ *Biek Holdings* (n 12). GS Personenassociaties (Van Veen) paragraph 4.2.3.1 (23/02/2018).

⁵⁶ *Biek Holdings* (n 12).

⁵⁷ MJ Kroeze, L Timmerman & JB Wezeman, *Kern van het ondernemingsrecht*, (Wolters Kluwer 2017) 105, view of Schild in BF Assink & AJP Schild (n 41) 632, WJM van Veen, 'Ontwikkelingen jurisprudentie Hoge Raad Ondernemingsrecht' (2016) WPNR 265.

⁵⁸ Assink in BF Assink & AJP Schild (n 41) 632.

⁵⁹ Similar to what the Supreme Court has ruled in the *Carlande* case in relation to the joining of a partner in a general partnership (HR 13 March 2015, ECLI:NL:HR:2015:588). This reasoning has been questioned by Van Veen and Tervoort as it would not be aligned with earlier jurisprudence which ruled that the claim vis-à-vis the partners personally is not a subsidiary claim: W.J.M. van Veen (n 53) 71 Ondernemingsrecht 370 and AJSM Tervoort, 'Toetredende vennoot c.v. aansprakelijk voor bij toetreding bestaande vennootschapsschulden' (2015) Ondernemingsrecht 267.

⁶⁰ Art 3:310 DCC.

⁶¹ Art 6:162 DCC.

the basis of the statute or when the act of the partner is acknowledged in society as an act of the partnership.⁶² This requires at least that the act needs to be performed in the normal activities of the partnership and is dependent on the circumstances of the case.⁶³ However, the latter possibility does not derive directly from a Supreme Court judgment in relation to a (professional) partnership, but from an analogous application of a judgment that concerned a legal person.⁶⁴ It has been argued that having legal personality is not a decisive characteristic for attribution of a tortious act. A professional partnership also acts as a unit in society and would therefore be eligible for attribution.⁶⁵ The possibility of attribution of a tortious act by one or more of the partners to the partnership as well as the analogy used to establish this attribution, however, has been questioned in literature. A reasoning used for this is that the partner could not be a representative of the partnership when committing the act and the partner cannot be identified (*vereenzelvigd*)⁶⁶ with the partnership.⁶⁷ Another reasoning is that attribution should not be based on analogy of the aforementioned Supreme Court judgment but should be based on the fact that the partnership has a separate patrimony and that a tortious act which is related to the activities of the partnership to such an extent that third parties with a claim relating to damages resulting from this act should be able to take recourse for this claim on the separate patrimony.⁶⁸

In addition to the question whether the partnership can be held liable for the tortious acts of one or more of its partners (the claim vis-à-vis the partnership: i.e. the collective of partners), the question arises whether partners can be personally liable for the tortious act that is attributed to the partnership on the basis of being a partner (claim(s) against the individual partners). This liability is distinct from a personal liability of the partner who acted him/herself and can be accused of improper personal behaviour.⁶⁹ This partner would be primarily personally liable on the basis of the law of obligations.⁷⁰ When two or more partners committed the tortious act,

⁶² HR 6 April 1979, ECLI:NL:HR:1979:AH8595 (*Kleuterschool Babbel*), Asser/Maeijer & Van Olfen 7-VII 2017/118, AL Mohr / VAEM Meijers (n 21) 114, AJSM Tervoort (n 19) 133, and GS Personenassociaties (Tervoort) paragraph 3.3.7.1 (09/12/2017).

⁶³ Asser/Maeijer & Kroeze 2-I* 2016/87.

⁶⁴ The Court of Appeal has applied the analogy to a general partnership in: Hof Arnhem 15 March 2011, ECLI:NL:GHARN:2011:BP9082 (*Al / Klepke*).

⁶⁵ JM Blanco Fernández Commentary by Hof Arnhem 15 March 2011, ECLI:NL:GHARN:2011:BP9082 (*Al / Klepke*) in JOR 2011/142.

⁶⁶ Different terminology has been used in relation to consider an act, an act of the legal person / partnership: attribution, identification and the act needs to count as an act of the legal person / partnership. This is considered to be semantics instead of having a deeper meaning: Asser/Maeijer & Kroeze 2-I* 2016/86.

⁶⁷ Slagter, *Personenassociaties* I, III, 4,1.

⁶⁸ ChrM Stokkermans (n 54) 185-199.

⁶⁹ Asser / Maeijer 5-V 1995/120.

⁷⁰ Art 6:162 DCC.

they would be jointly and severally liable for this act that they committed themselves on the basis of art 6:102 DCC.⁷¹

A variety of opinions exist on the personal liability of partners on the basis of being a partner⁷² assuming that the act has been attributed to the partnership: (1) the partners cannot personally be held liable for the tortious act performed by another partner⁷³, (2) the partners can be held personally liable for the tortious act on the basis of partnership law (for equal parts)⁷⁴ and (3) the partners can be held personally liable but not on the basis of partnership law but on the law on obligations (jointly and severally) because art 7A:1680 DCC speaks of liability vis-à-vis creditors ‘with whom they have traded’ (*‘met wien zij gehandeld hebben’*).⁷⁵ In the *Biek Holdings* case, the behaviour that gave rise to the litigation was malpractice by lawyers. It seems that the legal ground used to hold the partners of the professional partnership personally liable was breach of contract. A claim relating to malpractice can also be based on tort when the act is unlawful (*onrechtmatig*) independent from the contractual obligations.⁷⁶ Both are obligations arising out of the law. It is the opinion of the authors that under current law, partners can be personally liable on the basis of being a partner for a tortious act that can be attributed to the partnership, and that on the basis of the *Biek Holdings* case this personal liability of partners is based on partnership law and thus for equal parts⁷⁷ and not on the law of obligations.⁷⁸ Personal liability of partners who enter and exit the partnership is similar to the liability discussed in relation to breach of contract above.

Liability on the Basis of the law of Service Agreements

In addition, liability rules are included in the law on service agreements. This law determines that: when two or more persons have received an assignment together, each of them is jointly and severally liable for a breach of contract, unless the breach cannot be attributed to him/her.⁷⁹ If the service agreement has been entered into by

⁷¹ ChrM Stokkermans (n 16) 118.

⁷² So not the partners who performed the tortious act themselves.

⁷³ Van Veen is of the opinion that all obligations arising out of law should not fall within the scope of partnership liability on the basis of parliamentary history. This would mean that the ‘non-acting’ partners cannot be held liable for torts committed by their fellow partners. However, he addresses that the Supreme Court has ruled in the *Biek Holdings* case that personal liability of partners in relation to the obligation to pay for damages as a result of a breach of contract is based on partnership law; this is an obligation arising from law. On that ground we assume that Van Veen is also of the opinion that under current law damages resulting out of tort fall within the scope of the personal liability of partners on the basis of partnership law: WJM van Veen (n 53) 370. See also: JM Blanco Fernández (n 65).

⁷⁴ Asser/Maeijer 5-V 1995/118, Asser/Maeijer & Van Olffen 7-VII 2017/118, GS Personenassociaties (Tervoort) paragraph 3.3.7.1 (09/12/2017) and AJSM Tervoort (n 19) 136-137.

⁷⁵ Art 6:102 DCC. AL Mohr / VAEM Meijers (n 21) 114 and ChrM Stokkermans (n 54) 185.

⁷⁶ HR 22 September 2017, ECLI:NL:HR:2017:2444 (*Stichting Participanten Warmond/Lexence*).

⁷⁷ Art 7A:1679-1680 DCC.

⁷⁸ Art 6:102 DCC.

⁷⁹ Art 7:407(2) jo. 6:6(2) DCC.

one or more partners in name of the partnership with a third party, the rules about representation set out above apply to determine whether there is an agreement concluded between the partnership (i.e. the collective of partners) and the third party. If there is an agreement with the partnership this means that in relation to obligations arising out of this agreement third parties will have a claim vis-à-vis the collective of partners and can take recourse on the separate patrimony of the partnership.⁸⁰ Furthermore, the Supreme Court has clarified that when the professional partnership has accepted the assignment, every partner who was partner at the time the partnership entered into the agreement can be held personally liable on the basis of art 7:407 (2) DCC vis-à-vis the client for the entire obligation. This liability prevails over a possible personal liability on the basis of partnership law.

Art 7:407 (2) DCC includes an exculpation which entails that a person will not be personally liable under this provision when the breach/failure (*tekortkoming*) cannot be attributed to him/her. In the literature it has been argued that this exculpation possibility cannot be called upon in the situation of a partnership as a result of the partnership law rules.⁸¹ As a counterargument, it has been stated that it is not balanced when on the one hand it is ruled that the strongly deviating rule of joint and several liability on the basis of the law on service agreements applies to partners of a partnership but on the other hand that the exculpation rule included in that provision does not apply because of the fact that it concerns partners of a partnership.⁸² In our view, the Supreme Court did not explicitly rule on this issue as it has only ruled that no extra requirements apply in relation to the personal liability of partners. This reference to ‘extra requirements’ is not applicable to the question

⁸⁰ *Biek Holdings* (n 12). Asser/Maeijer 5-V 1995/106 and 116b, Asser/Maeijer & Van Olfen 7-VII 2017/116b, AL Mohr / VAEM Meijers (n 21) 112.

⁸¹ Asser/Maeijer & Van Olfen 7-VII 2017/116b. See for attribution in relation to art 7:407(2) DCC: Asser/Tjon Tjin Tai 7-IV 2014/146. Nijland has argued that the liability on the basis of art 7:407(2) DCC is a liability based on the status of being a partner as partners who were not involved in concluding the agreement or in performing the activities under the agreement are liable on the basis of this article. As a result, attribution seems already established by this approach and the exculpation possibility seems incompatible: N Nijland, ‘De meerpartijovereenkomst. De aansprakelijkheid van de individuele maat nader beschouwd’, in CG Breedveld-de Voogd (eds), *De meerpartijovereenkomst* (Wolters Kluwer 2015) 127-138.

⁸² AJSM Tervoort (n 19) 140. See also JB Wezeman and HE Boschma, ‘De personenvennootschap op weg naar 2020: Het rapport Modernisering personenvennootschappen: een geslaagde eerste aftrap’ (2017) *Ars Aequi* 203. Stokkermans has criticized Tervoort’s ‘solution’ of providing the partners with the exculpation possibility of art 7:407(2) DCC as a balanced approach of applying art 7:407(2) DCC to a partnership. To underline this Stokkermans refers to the *Biek Holdings* judgment and states that the approach of Tervoort is incompatible with this judgement; see p 115. However, on p 117, he states that according to the Supreme Court a partner is able to exculpate himself on the basis of art 7:407(2) DCC because the Supreme Court ruled that a certain partner who was partner when the partnership entered into the agreement could *in principle* be liable on the basis of art 7:407(2) DCC. Because the wording *in principle* is used, an exculpation possibility would exist. Perhaps the reference to art 7:407(2) DCC and Tervoort is unfortunate and the possible point to be made was actually only related to the liability on the basis of partnership law (art 7A:1679-1681 DCC) instead of the liability on the basis of the law on service agreements (art 7:407(2) DCC).

on exculpation as the statement of the Supreme Court concerns the question whether requirements in addition to being a partner need to be complied with for the liability to arise, where the question in relation to art 7:407(2) DCC is the question whether a partner can state circumstances that would exculpate him/her. That is, although both are concerning attribution, a different question. However, the Supreme Court did include the wording that the partners who were partner at the time the partnership entered into the service agreement are *in principle* liable for a breach of contract. That could indicate that there is an exculpation possibility, but this is not explicitly stated. Moreover, in case a partner is not liable on the basis of art 7:407(2) DCC for a breach of contract, (s)he can still be liable on the basis of art 7A:1679-1681 DCC for that breach of contract.⁸³ This would indicate that a exculpation possibility would exist, otherwise partnership law would not be applicable at all.

When the assignment has been granted to the professional partnership with a specific person in mind who together with the party to the agreement performs activities under the agreement, this person is also jointly and severally liable vis-à-vis the third party on the basis of the law on service agreements.⁸⁴ This person could be a partner of the partnership but this is not necessary. An employee as well as a practitioner who uses a limited liability company for his/her participation in the partnership can be held liable on the basis of this provision.⁸⁵ Partners who were partners at the time the service agreement was signed and who exit the professional partnership will remain liable on the basis of art 7:407(2) DCC for partnership's debts and obligations that arose during the period that they were partner. Depending on the circumstances this may also apply to debts that arise after they exited the partnership but are based on the service agreements that have been entered into before the exit. The period within which claims can be brought against a partner who exited depends on the type of debt or obligation ranging from five years to twenty years.

The liability rules relating to the agreement of services⁸⁶ may be excluded by the partnership in its general conditions.

General Partnership

Definition of a General Partnership

The second type of partnership is the general partnership, which is a species of the professional partnership.⁸⁷ All articles that apply to professional partnerships also

⁸³ *Biek Holdings* (n 12).

⁸⁴ Art 7:404 DCC.

⁸⁵ HR 18 September 2015, ECLI:NL:HR:2015:2745 (*Alasco Vastgoed BV*).

⁸⁶ Art 7:404 and 407 DCC.

⁸⁷ Art 16 CC. For an extensive overview of the Dutch general partnership we refer to: PPD Mathey-Bal, *De positie van de vennootschap onder firma: In civielrechtelijk, vennootschapsrechtelijk, publiekrechtelijk en Europeesrechtelijk perspectief*, (Wolters Kluwer 2016).

apply to the general partnership unless specific rules for the general partnership exist which are mainly included in the Commercial Code.⁸⁸ The general partnership can be defined as the partnership established with the objective of performing non-professional business activities under a common name.⁸⁹ The same objective criteria as discussed in relation to the professional partnership apply to determine whether a general partnership exists with the difference in (1) the type of activities being performed which (2) need to be performed under a common name (in a professional partnership this is possible but not necessary).⁹⁰ The general partnership needs to be established by authentic or private instrument (deed).⁹¹ This is a formal requirement not a constitutive requirement. The instrument/deed is required as evidence for the existence of the general partnership in the situation that a partner wants to prove the existence vis-à-vis another partner or a third party. When such an instrument/deed is absent this cannot be used against third parties.⁹² The general partnership has the capacity to sue and to be sued in its own name⁹³ without it being necessary that the partners or each of them personally are party to the proceedings. The general partnership has to be registered with the Commercial Register similar to the professional partnership.⁹⁴ This registration is also not a constitutive requirement.

Lack of Legal Personality; Separate Patrimony

The general partnership does not have separate legal personality similar to the Private Limited Company, but is a collective of its partners in their partnership relation.⁹⁵ The Supreme Court considered, however, that although the general partnership does not have separate legal personality, it is acknowledged in society as a separate entity that can participate in society independently as well as it is treated as such in different parts of the law. This resembles an entity with legal capacity (*rechtssubject*).⁹⁶ The general partnership also has a separate patrimony.⁹⁷ In

⁸⁸ Art 15 WvK.

⁸⁹ Art 16 CC.

⁹⁰ A silent general partnership can thus not exist.

⁹¹ This instrument/deed is a signed document destined to serve as evidence (art 156a Law of Civil Procedure).

⁹² Art 22 CC.

⁹³ Art 51 Law of Civil Procedure.

⁹⁴ Art 23 CC jo. 5 sub a DCRA 2007 jo. 2(1) DCRR 2008.

⁹⁵ HR 23 December 1892, W 6287 (*Planteijdt c.s.*) and HR 27 April 2012, ECLI:NL:HR:2012:BV5569 (*Duijsens/Van den Steenhoven*).

⁹⁶ HR 6 February 2015, ECLI:NL:HR:2015:251 (*VDV Totaalbouw*). The Supreme Court ruled that a general partnership can be declared bankrupt 9 Art 4(3) jo. 2(3) Bankruptcy Act) without the personal bankruptcy of the partners.

⁹⁷ HR 28 June 1889, W 5735 (*De Beaumont/Tielens*), HR 26 November 1897, *Boeschoten/Besier* (n 28), HR 24 January 1947, ECLI:NL:HR:1947:BG9451 (*Rouma/Levelt*), HR 18 December 1959, ECLI:NL:HR:1959:BG9455 (*De Gouw/De Hamer*), HR 9 May 1969, ECLI:NL:HR:1969:AC0846 (*Rotterdam-Limburg Beurvaart*), HR 3 December 1971, ECLI:NL:HR:1971:AB6790 (*Hotel Jan Luyken*), HR 17 December 1993, ECLI:NL:HR:1993:ZC1182 (*Van den Broeke / Van der Linden*) and *VDV Totaalbouw* (n 96).

general, the aspects that have been discussed in relation to the separate patrimony of the professional partnership also apply to the general partnership. When one or more or even all partners are declared bankrupt, this does not automatically causes the partnership to become bankrupt.⁹⁸

Representation

A substantial difference between the professional partnership and the general partnership concerns the representation rules. In a general partnership each partner, in principle, has the right of (external) representation of the general partnership and thereby the other partners⁹⁹ when the act reasonably facilitates the accomplishment of the purpose of the general partnership.¹⁰⁰ No proxies are needed. Limitations and exclusions may be agreed upon. Specific agreements relating to the representation authority only have external effect if these are clearly defined and registered with the Commercial Register or when the partnership is registered but the limitation in representation is not or in an incorrect manner, however the third party was aware of the limitations.¹⁰¹ Partners who are not authorized to represent the general partnership, in principle, do not bind the general partnership,¹⁰² unless the partnership has caused false impressions about the authority of the partner to represent the partnership (*'toerekenbare schijn'*)¹⁰³, or confirmed the act (*'bekrachtiging'*)¹⁰⁴ or when the partnership benefits from the act (*'baat'*).¹⁰⁵ In the situation that this partner nevertheless acts, (s)he is bound by the act on the basis of partnership law.¹⁰⁶

Liability and the General Partnership

Liability for Absence of Registration with the Commercial Register

When the general partnership has not been registered with the Commercial Register the partnership can be treated in the relationships with third parties as a partnership which is established for indefinite time, for all issues and with all of the partners authorized to represent the partnership without limitations.¹⁰⁷ An object clause or representation limitation included in a partnership agreement cannot be used against third parties in relation to legal acts (not obligations arising out of law)¹⁰⁸ when this

⁹⁸ Asser/Maeijer & Van Olfen 7-VII 2017/180.

⁹⁹ Art 17(1) CC.

¹⁰⁰ HR 8 June 1990, ECLI:NL:HR:1990:AC0414 (*Kruithof/Wittenberg*).

¹⁰¹ Art 25 DCRA 2007.

¹⁰² Art 17(2) CC.

¹⁰³ Art 3:61(2) DCC.

¹⁰⁴ Art 3:69 DCC.

¹⁰⁵ Art 7A:1681 DCC.

¹⁰⁶ Art 7A:1681 DCC.

¹⁰⁷ Art 29 CC.

¹⁰⁸ Asser/Maeijer & Van Olfen 7-VII 2017/142a.

party invokes the absence of registration with the Commercial Register. This also applies when the third party was aware of the limitations in the object clause and in representation authorities¹⁰⁹ unless this is in violation of reasonableness and fairness.¹¹⁰ In case the third party does not invoke the absence of registration the limitations do have legal force. When the registration is incorrect or incomplete a third party can rely on this incorrect or incomplete information, unless the third party was aware that the information was incomplete and/or incorrect and had knowledge of the correct information.¹¹¹

Liability on the Basis of Partnership Law

The ‘two claims doctrine’, which is described above in relation to the professional partnership also applies to the general partnership.¹¹² A third party may have a separate claim vis-à-vis the general partnership (the collective of partners) and separate claims vis-à-vis the individual partners.

a. Claim against the partnership

With regard to the first claim the third party can take recourse on the separate patrimony of the partnership and not on the individual assets of the partners.¹¹³

b. Claims against the partners personally

For the second claim, the third party can take recourse on the individual assets of the partners. An exception to the separation of the ‘two’ claims is the situation where there is a judgment in which all partners are held personally liable with regard to an obligation of the partnership (proceedings with regard to the second claim). In that case, the third party can also take recourse for the damage on the separate patrimony of the partnership because the partners can, in addition to their personal defences, bring forward defences that could have been used by the partnership if it would have been sued as a party in the legal proceedings.¹¹⁴ Differences between the professional partnership and the general partnership exist in relation to the personal liability of partners.

i. Performance under an agreement, breach of contract and tort

¹⁰⁹ Asser/Maeijer 5-V 1995/140 and Asser/Maeijer & Van Olfen 7-VII 2017/141.

¹¹⁰ AJSM Tervoort (n 19) 66.

¹¹¹ Art 25 DCRA 2007.

¹¹² *De Gouw/De Hamer* (n 97), *Rotterdam-Limburg Beurtvaart* (n 97), Asser/Maeijer 5-V/145, Asser/Maeijer & Van Olfen 7-VII 2017/146 and 178 and K Teuben (n 20) 269-278.

¹¹³ *Van den Broeke / Van der Linden* (n 97) and Asser/Maeijer & Van Olfen 7-VII 2017/176 and AL Mohr / VAEM Meijers (n 21) 130.

¹¹⁴ *Hotel Jan Luyken* (n 97) and Asser/Maeijer 5-V 1995/177 & 417, Asser/Maeijer & Van Olfen 7-VII 2017/178 and AL Mohr / VAEM Meijers (n 21) 130-131.

An important distinction between the professional partnership and the general partnership is that partners of a general partnership are each jointly and severally liable towards the general partnership's creditors on the basis of partnership law¹¹⁵ instead of liability for an equal share. The leading doctrine is that art 18 CC covers every obligation of the partnership, whether these concern the primary obligation or a secondary obligation to pay for damages, whether this is based on a breach of contract or tort,¹¹⁶ with the exception of obligations vis-à-vis partners who, in relation to the specific obligation, cannot be regarded as third parties.¹¹⁷ A contrary opinion asserts that parliamentary history shows that art 18 CC only concerns obligations arising out of legal acts.¹¹⁸ Also, with the general partnership it is possible to agree upon a different liability regime with the third party, for example that only the partnership is liable and not the partners. It is not possible to apply such a regime without the consent of the third party. A third party can request performance of each the partnership and the partners of the entire obligation.¹¹⁹ When one of them performs, the other parties are released from the obligation.¹²⁰ This is not the situation in case of a out-of-court-settlement as the joint and several liability is a separate obligation. After the out-of-court-settlement each of the partners is jointly and severally liable for the amount that remains after the out-of-court-settlement has been deducted from the original amount.¹²¹ It has been argued that partners of a general partnership cannot be held personally liable on the basis of art 7:407 (2) DCC, because the partnership has legal capacity and as such will be the party that receives the assignment.¹²²

Another difference with the professional partnership is the liability of partners that join the partnership after its origination. In contrary to the professional partnership, the Supreme Court has explicitly ruled in the *Carlande* case that partners of a general partnership are liable for the obligations of the partnership that exist before they join the partnership.¹²³ In the opinion of the Supreme Court, partners would have the opportunity to gather information before the moment they join the partnership and they could negotiate to receive guarantees and beneficial internal liability arrangements. In addition to these factors, the Supreme Court addressed that this rule would protect creditors in the situation that the separate patrimony is not sufficient to cover the obligation. When a partner exits the partnership, (s)he remains liable for the existing obligations for the period as mentioned with regard to the professional

¹¹⁵ Art 18 CC.

¹¹⁶ *Al / Klepke* (n 64).

¹¹⁷ Asser/Maeijer & Van Olffen 7-VII 2017/145 and 148, ChrM Stokkermans (n 16) 258, AJSM Tervoort (n 19) 141-143 and AL Mohr / VAEM Meijers (n 21) 128.

¹¹⁸ WJM van Veen (n 53) 370. See for another opinion that tort should fall outside the scope of partnership law: JM Blanco Fernández (n 65).

¹¹⁹ AJSM Tervoort (n 19) 141.

¹²⁰ Art 6:7(1) DCC.

¹²¹ Art 6:7 (2) DCC.

¹²² ChrM Stokkermans (n 16) 257.

¹²³ *Carlande* (n 59).

partnership. It is unclear whether (s)he is also liable for obligations that arise after the exit but are based on an agreement entered into before the exit. Some judgements of the Court of Appeal have held former partners liable for these obligations.¹²⁴

Limited Partnership

Definition of a Limited Partnership; Lack of Legal Personality; Separate Patrimony

The Limited Partnership is a species of the professional partnership. All articles that apply to professional partnerships also apply to the Limited Partnership unless specific rules for the Limited Partnership exist. The Limited Partnership can be defined as the partnership established with the objective of performing non-professional business activities under a common name. It distinguishes itself by having two types of partners (each either natural persons or legal entities): namely one or more general partners (*beherend vennoten*) and one or more limited partners (*commanditaire vennoten*).

Although the Limited Partnership does not have legal personality, the assets committed to the Limited Partnership constitute a separate patrimony. The right to seize property is exclusive to the Limited Partnership's creditors.

Liability and the Limited Partnership

The Limited Partnership should have at least one general partner who can manage and represent the Limited Partnership and who is personally liable for the obligations of the Limited Partnership. If there are two or more general partners they are jointly and severally liable towards the Limited Partnership's creditors.¹²⁵ The limited partner of the Limited Partnership is subject to a different liability regime. His/her liability towards the Limited Partnership is limited to the amount of his/her (capital) contribution. A limited partner is not personally liable for the obligations of the Limited Partnership. Importantly, however, is the fact that under certain circumstances the privilege of limited liability may be withdrawn if the limited partner violates the prohibition on management or the prohibition on the use of his name in the name of the Limited Partnership.¹²⁶ A further investigation into the position of the limited partner falls outside the scope of this article.

The Proposal

Types of Partnerships under the Proposal

¹²⁴ See for instance: Hof Arnhem-Leeuwarden 16 June 2015, ECLI:NL:GHARL:2015:4389 (*Van Dijk / Trapezium*).

¹²⁵ Art 18 and art 19 CC.

¹²⁶ Art 20 and art 21 CC.

In the Proposal the Working Group introduces the term partnership (*vennootschap*) as a *sui generis* term, a term which is not used as such in current partnership law. Under the Proposal, a *vennootschap* is the agreement to collaborate aimed at performing professional or non-professional activities with the contribution of each of the partners and with the objective of obtaining benefits and sharing these amongst the partners.¹²⁷ The partnership that participates in legal transactions under a common name in a way that is apparent to third parties, is characterized as a public partnership.¹²⁸ The three types of partnerships as we currently know them still exist in the Proposal and they keep their names, *maatschap*, *vennootschap onder firma*, and *commanditaire vennootschap*. However, in contrast to current law the *maatschap* cannot be silent.¹²⁹ The *maatschap* is defined as: ‘The public partnership aimed at the performance of professional activities’, the *vennootschap onder firma* as: ‘The public partnership aimed at the performance of a business’¹³⁰ and the *commanditaire vennootschap* as: ‘The public partnership aimed at the performance of a business consisting of one or more general partners (*beherend vennoten*) who/which are liable for the obligations of the partnership and one or more limited partners (*commanditaire vennoten*) who/which are not liable for the obligations of the partnership’.¹³¹ As a result, the distinction between professional and non-professional activities remains in place in the Proposal while the Working Group does not clearly specify the difference between professional or non-professional. The Proposal defines professional activities as activities for which the practitioner has special qualifications, which would be performed under his/her personal responsibility and that are in principal an intellectual achievement for which a bond of trust exists between the practitioner and the client.¹³² The Working Group stresses that practice is familiar with the distinction, while no difficulties with the distinction have become apparent. They also point to other jurisdictions that use such a distinction and abolishing it would in the view of the Working Group lead to adoption problems.¹³³ The main reason for keeping the distinction is the possibility of introducing a special liability regime for the professional partnership, discussed below.

Legal Personality

A quite innovative element of the Proposal of the Working Group is its starting point that each public partnership will obtain legal personality the day after the day the partnership has been registered with the Commercial Register. Reasons for

¹²⁷ Art 1(1) Proposal. There is no official English translation of the Proposal available at the time of writing of this article.

¹²⁸ Art 3(2) Proposal. Logically, the partnership that is not public is a silent partnership.

¹²⁹ A partnership that is silent despite the fact that it is aimed at professional or non-professional activities, is called a ‘silent partnership’ (*stille vennootschap*).

¹³⁰ Art 4(2) Proposal.

¹³¹ Art 4(3) Proposal.

¹³² Werkgroep personenvennootschappen (n 3) 74.

¹³³ Werkgroep Personenvennootschappen (n 3) 13.

introducing the legal personality are the introduction of a simplified regime applicable to the property whereby the public partnership/legal person itself is owner of the property as a result of which entry and exit of partners will be less cumbersome and restructuring will be facilitated. In addition, it will provide clarity of the partnership's own identity as contracting party. The granting of legal personality to public partnerships is a long-expected move in partnership law. However, this legal personality differs from that of Book 2 DCC-legal persons, like Private Limited Companies, Public Limited Companies, Cooperatives or Mutual Insurance Societies (hereinafter: 'B2DCC-legal persons'). When a B2DCC-legal person enters into an agreement only the legal person is contracting party and not its shareholders or members. In the Proposal the partners of a public partnership will still be contracting parties together with the partnership when the partnership enters into agreements. Consequently, the partners remain personally liable for the obligations entered into by the partnership.

It should be noted that the acquisition of legal personality depends on the registration of the public partnership with the Commercial Register. The day after this registration the public partnership obtains legal personality. A notarial deed is not necessary, which caused criticism by Dutch notaries as traditionally obtaining legal personality has long been connected to a notarial deed in the Netherlands.¹³⁴ A public partnership that has its enterprise in the Netherlands has to be registered with the Commercial Register. However, under the Proposal it is possible that a partnership can exist without having legal personality as the registration is not a constitutive act for the existence of the partnership. When a partnership exists – and as we have seen this is also possible even when parties are not aware of the fact that their collaboration qualifies as partnership or in case they tried to avoid it by explicitly stating that their collaboration is not a partnership while it meets the material requirements – and it has not been registered, the partners are committing an economic offence, but the partnership is and remains in existence. Consequently, the complicated regime of property law that was meant to be abandoned, will still be applicable to those 'unregistered' partnerships. Also, the new restructuring options of the Proposal cannot be used by 'unregistered' partnerships as set out below.

Representation

For the three types of public partnerships the Proposal contains the very same representation rule: each general partner¹³⁵ has the right of (external) representation

¹³⁴ Letter of the Royal Professional Organisation of Notaries (KNB) to the chairman of the Working Group, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016), Bijlage III – Reactie KNB and VOC, 'Standpunt VOC inzake rapport modernisering personenvennootschappen', in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) Bijlage IV – Reactie VOC.

¹³⁵ A limited partner does not automatically has representation authority, but may represent the Limited Partnership by proxy (art 22(1) Proposal).

of the public partnership and thereby the other partners when the act facilitates the accomplishment of the purpose of the public partnership in any way.¹³⁶ This means that with respect to a public partnership with legal personality, this right of representation is twofold: first the right to represent the partnership as a legal person and second the right to represent the partners individually when entering into agreements in name of the partnership.¹³⁷ Contrary to current law each partner of a professional partnership (*maatschap*) automatically has the right of (external) representation of the partnership. Specific limitations and exclusions relating to the representation authority may be agreed upon, but only have external effect if these are clearly defined and registered with the Commercial Register. If the limitation or exclusion in representation is not or is registered in an incorrect manner, it cannot be invoked against a third party who was not aware of the limitation or exclusion.¹³⁸ When an unauthorised partner represented the public partnership, the latter is not bound by the act unless the partnership has caused false impressions about the authority of the partner to represent the partnership (*'toerekenbare schijn'*)¹³⁹ or confirmed the act (*'bekrachtiging'*).¹⁴⁰ The legal provision of art 7A:1681 DCC that the partnership also is bound by the act if it benefits from that act (*'baat'*) will be abolished. The Proposal, however, maintains the deviation rule that when the partnership is not bound by the act, the unauthorised partner that represented the partnership binds him/herself.¹⁴¹

Liability Rules

According to the Working Group, the current liability regime is in need of clarification and amendment, especially in relation to the liability of partners joining the partnership for obligations existing at the moment of accession and the continuation of the liability of partners after an exit.¹⁴² The Working Group holds on to the 'two claims' doctrine similar to what applies under current law.¹⁴³ It clarifies that obligations on the basis of personal liability of partners in the context of the partnership are independent obligations.¹⁴⁴ When a partner fulfils this obligation it does not have impact on the obligations of fellow partners, with the exception that the fulfilment by the partners will be deducted from the obligation of his/her fellow partners. The personal liability of the partners (not specifically joining or exiting) will change substantially compared to current law.

¹³⁶ Art 18 Proposal. Only in the case of a silent partnership (*stille vennootschap*), the partners do not automatically have the right to represent the other partners. They need a proxy (*volmacht*).

¹³⁷ Werkgroep personenvennootschappen (n 3) 92.

¹³⁸ Art 25 DCRA 2007 and art 7(1) Proposal.

¹³⁹ Art 3:61(2) DCC.

¹⁴⁰ Art 3:69 DCC.

¹⁴¹ Werkgroep personenvennootschappen (n 3) 95.

¹⁴² Werkgroep personenvennootschappen (n 3) 18.

¹⁴³ Werkgroep personenvennootschappen (n 3) 94.

¹⁴⁴ Werkgroep personenvennootschappen (n 3) 93.

Liability on the Basis of Partnership Law versus the Law on Obligations

a. Claim against the professional partnership

The partnership can be held liable by third parties for the obligations under agreements, a breach of contract, other obligations arising out of law, and for tortious acts. For this latter liability the Working Group adheres to attribution requirements developed in relation to legal persons. The group explicitly states that this doctrine can be applied to partnerships whether or not they have legal personality.¹⁴⁵ Claims can be asserted to the partnership itself and recourse can be taken on the assets of the partnership or the separate patrimony in case of a partnership without legal personality.

b. Claims against partners personally

The proposed personal liability rules for partners are strongly based on legal methodology (*wetssystematiek*). For the liability rules to be included in partnership law (which will be part of Book 7 DCC) the Working Group makes a distinction between obligations that the partnership agreed to be bound by (obligations to perform arising out of legal acts) and obligations arising from law (such as payment of damages for the breach of contract, tort or other statutory obligations) (hereinafter: distinction in source of liability). It seems that this perspective is strongly connected with the view of one of the Working Group members in relation to liability rules of partnerships.¹⁴⁶ Although not included in the explanatory notes, an important objective for the design of the liability regime could then be that the regime should fit the legislative history and in light thereof address the conjunction of liability with the representation rules. The authority to represent the partnership is seen as an authority to represent the partners who are partners at the time of the representation¹⁴⁷ as those partners have agreed to be bound by the obligations that the partnership enters into. When the partnership is a legal person, these partners become parties to the agreement in addition to the partnership. A deviation of this rule is the liability of acceding partners as under the Proposal these partners are liable for obligations that have entered into before the accession but become due and payable after this moment. The joining partner is, however, not party to the agreement.

i. Performance under an agreement

¹⁴⁵ Werkgroep personenvennootschappen (n 3) 95.

¹⁴⁶ WJM van Veen (n 57) 265 and WJM van Veen (n 53) 370.

¹⁴⁷ Werkgroep personenvennootschappen (n 3) 94.

This liability remains a liability under partnership law for divisible obligations. The proposal holds on to the distinction between a professional partnership and a general partnership for liability reasons. This means: for the professional partnership the liability is for equal parts¹⁴⁸ and for the general partnership this liability is joint and several.¹⁴⁹ Liability for equal parts does not apply when the law provides for a different rule, for instance in case of non-divisible obligations (art 6:6 (2) DCC) or when partners have entered into arrangements with third parties about deviating liability rules.¹⁵⁰

ii. *Breach of contract*

Legal obligations will be dealt with by the rules that govern that obligation and not by partnership law. When considering the payment of damages on the basis of a breach of contract, it works as follows: the Proposal requires that when a partnership enters into contracts, the partners will also be parties to the agreement, they will be personally bound by the contract and personally liable for the breach of contract but as mentioned not on the basis of their status of partner but on the basis that they are parties to the contract.¹⁵¹

iii. *Tort*

When one or more of the partners but not all performed a tortious act that can be attributed to the partnership, there may be a claim against the partner(s) who performed the tortious act on the basis of the law of obligations.¹⁵² When two or more partners are liable for the same damage they will be jointly and severally liable.¹⁵³ However, and contrary to current law, there will be no claim against the 'non-acting' partners on the basis of being partner at the time the damage arose. According to the Working Group there is no room for claims against the other partners, unless they have committed a tortious act themselves. This means that the personal liability of partners is limited in relation to tortious acts conducted by their fellow partners. They can only be affected through recourse on the property of the partnership or the separate patrimony in case of a partnership without legal personality.

iv. *Limitation of liability*

The Proposal contains an exception to the rules explained above in the situation a professional partnership entered into a service agreement involving the performance of professional activities. The rule that governs the liability in this situation is a

¹⁴⁸ Art 19(2) Proposal.

¹⁴⁹ Art 19(1) Proposal.

¹⁵⁰ Art 19 (1)(2) Proposal.

¹⁵¹ Art 6:74 and 6:75 DCC.

¹⁵² Art 6:162 DCC.

¹⁵³ Art 6:102 DCC.

partnership law rule, but governs both the situation of a breach of contract and a tortious act in relation to the service agreement as it includes a rule that governs the liability when one or more partners have conducted a ‘breach/failure’ (*tekortkoming*) or a (professional) ‘error/wrongdoing’ (*(beroeps)fout*) which is similar to ‘negligence, malpractice or misconduct’. A claim relating to a professional error/wrongdoing can be based on both grounds: contractual breach and tort. When the service agreement is entered into by the partnership, only the partners that have been charged with the assignment under the service agreement can be held liable, unless the breach or the misconduct cannot be attributed to the partner or the law states something else or the parties have agreed upon a different liability rule. These may be the partners who entered into the agreement in the name of the partnership, but it could also be other partners who have been assigned but were not part of the group of persons concluding the contract.¹⁵⁴ When it is not clear who is charged with the assignment, all the partners are expected to have been charged with the assignment. When the law of the service agreements is also applicable, this partnership law rule prevails.¹⁵⁵ Because of the ‘two-folded’ representation rule, art 7:407(2) DCC will be applicable to both the professional partnership and the general partnership with (and without) legal personality as a result of the fact that the partners will become individual parties to agreements entered into in name of the partnership.

v. *Liability of acceding partners*

The Working Group is of the opinion that the liability regime for acceding partners needs to be the same for all types of partnerships. This should not be a liability for obligations existing before the entry. Reasons for this standpoint are firstly that creditors are not being harmed in their recourse possibilities by the entry of a new partner and even benefit from the entry. Secondly, partners could be discouraged to join the partnership because of liability risks if they would be liable for existing obligations. Potential arrangements regarding guarantees or internal liability do not have value in the situation of bankruptcy of the partnership and its partners.¹⁵⁶ To avoid these risks the partnership could be dissolved and a new partnership could be established by the new partners. This, however, could in turn lead to costs and fiscal complications and is in violation of the principle that the identity of the partnership remains when the partner base changes.¹⁵⁷ The rule that the Working Group introduces in the Proposal is a liability of partners for the obligations that the partnership have entered into contractually before the accession, but become due and payable after the partner joined.¹⁵⁸ These obligations would benefit the partnership so according to the Working Group it stands to reason that the joining partner is also

¹⁵⁴ Werkgroep personenvennootschappen (n 3) 95.

¹⁵⁵ Werkgroep personenvennootschappen (n 3) 95.

¹⁵⁶ Werkgroep personenvennootschappen (n 3) 18, 97-98.

¹⁵⁷ Werkgroep personenvennootschappen (n 3) 19.

¹⁵⁸ Art 19(4) Proposal.

liable for these obligations as the enterprise will be run together with and for him/her.¹⁵⁹ Partners could agree on another arrangement by including a third-party clause in the partnership agreement.¹⁶⁰ The liability only concerns obligations arising out of a legal act for which the partnership has bound itself. Legal obligations do not fall within the scope of this liability.

vi. *Liability of exited partners*

The Working Group proposes including a special provision in partnership law relating to the liability of the partners who exited the partnership. This provision would replace the application of the limitation periods that can be found in property law that apply under the current regime. The partner who exits the partnership remains liable for the obligations of the partnership that exist at the moment of exit for the duration of the existence of the claim vis-à-vis the partnership with an expiration period of five years starting the day following the day on which the exit has been registered with the Commercial Register.¹⁶¹ When it concerns an obligation that exists at the moment of exit but which is not due and payable, the limitation period for this obligation starts at the moment the obligation becomes due and payable. Obligations that require special attention are continuing performance agreements. The explanatory notes to the Proposal state that the intentions of parties at the time of concluding the agreement determine whether the former partner remains liable for the performance under the agreement. The contractual relationship could be ended by termination¹⁶² or in certain cases contractual assignment or when the contract includes such a clause about exiting the partnership.¹⁶³ According to the Working Group, these rules on liability of a former partner serve legal certainty without being detrimental to the interests of the creditors.¹⁶⁴

Reflection on the Liability Rules Included in the Proposal

Under the Proposal the new liability regime remains quite complicated for entrepreneurs or could perhaps be perceived as even more complicated than it is under current law. The proposed regime includes some choices that could be reconsidered. These concern, firstly, the rule that partners will become (individual) parties to the agreements that are entered into in name of the partnership. Closely connected to this aspect is the distinction in source of liability (partnership law and the law on obligations). Lastly, the distinction between professional and non-

¹⁵⁹ Werkgroep personenvennootschappen (n 3) 98.

¹⁶⁰ Art 27 (2) Proposal.

¹⁶¹ Art 19(5) Proposal, art 19(5) jo. 27 (3) Proposal (re a partner who will be succeeded by another partner) and art 19(5) jo. 31 (3) Proposal (re a 'non-continuing' partner in case of continuation by one other partner).

¹⁶² This is seen by the Working Group as the standard rule, but the particular contract could contain deviating rules.

¹⁶³ Werkgroep personenvennootschappen (n 3) 98-99.

¹⁶⁴ Werkgroep personenvennootschappen (n 3) 98.

professional activities and the liability rules connected to this distinction should be reconsidered.

a. Partners are parties to the agreements entered into by the partnership and the distinction in source of liability

Although legal personality is introduced by the Proposal, partners will still be parties to the agreements entered into by the partnership because of the new ‘twofold’ representation rule. This multi-party construction seems to be a bit unusual in combination with the introduction of legal personality of the partnership. The reason for this appears to be solely the chosen structure of the liability regime with a separation between liability for obligations arising out of legal acts and obligations arising out of law on the basis of law methodology as discussed above. Arguments for the distinction in source of liability are not fully clear from the explanatory notes. In the notes the Working Group refers to certain jurisprudence¹⁶⁵ and states that the *Biek Holdings* and *Carlande* cases, the two major ‘recent’ judgments on liability in partnerships, deviate ‘somewhat’ but the Working Group does not explain what justifies an alternative choice.¹⁶⁶ From the outset, it is not obvious whether this route embedded in the distinction solves an existing problem.¹⁶⁷

In order to hold the partners of a partnership liable for a breach of contract on the basis of the law of obligations instead of partnership law, the partners need to individually be party to the agreement. This ‘hurdle’ of a multi-party construction is not necessary when the liability would be included in new partnership law. Would that approach lead to a preferable situation? Assuming that the rest of the regime suggested by the Working Group would remain the same, the personal liability of partners of a professional partnership in case of a breach of contract not being a contract for the performance of professional activities, would be for equal parts instead of joint and several. This implication could, however, be simply erased by changing the liability for equal parts in a liability that is joint and several. An amendment in the extent of liability would make sense as this liability rule would only apply to agreements related to non-professional activities. There would be no ground or justification to having a less stringent rule for these types of agreements for partners of a professional partnership than for partners of a general partnership (see below). Possible arguments against such an amendment as mentioned by the

¹⁶⁵ HR 13 december 2002, ECLI:NL:HR:2002:AE9261 (*Hitz/Theunissen*), *VDV Totaalbouw* (n 96), (*Rotterdam-Limburg Beurтваart* (n 97), HR 3 April 2015 and ECLI:NL:HR:2015:837 (*Eikendal q.q./Lentink Metaalwarenfabriek*).

¹⁶⁶ Werkgroep personenvennootschappen (n 3) 94.

¹⁶⁷ BF Assink, ‘Aansprakelijkheid en draagplicht: Kanttekeningen bij het (concept) Rapport van de Werkgroep Personenvennootschappen’, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 59-75.

Working Group, for instance transitory problems (e.g. transitory law),¹⁶⁸ do not seem to be convincing and are focused on the short term. The amendment¹⁶⁹ would probably not create such profound resistance of entrepreneurs against the liability rule that it would prevent a new act to be adopted by the States-General (similar to what has happened with the last legislative proposal). In light of the objectives of the Working Group, it would perhaps be even more systematic to tie the liability for primary and secondary obligations in relation to an agreement together in partnership law as secondary obligations also follow from a legal act.¹⁷⁰ Moreover, the Working Group is not very consistent with the idea of the distinction. The rule for the limitation of liability for breach of contract and liability based on tort in relation to professional activities is included in partnership law, which weakens the argument of methodology.

Another implication of the inclusion of the liability for a breach of contract for all sorts of agreements in partnership law compared to the Proposal in which the liability is based on the law of obligations, would be that a partner cannot use the exculpation possibility included in the law on obligations in case the breach cannot be attributed to the particular partner.¹⁷¹ If the aforementioned amendment were made, the exculpation could - if desirable - be included in partnership law as well. That would be in line with the Proposal, but the question arises whether this should be the general rule as it could lead to a standard limitation of partner liability based on the status of being a partner when the partner can prove the breach cannot be attributed. During the conference about the first draft of the Proposal held in 2016 the issue of the multi-party construction was addressed.¹⁷² One of the members of the Working Group reacted that it would be worthwhile to reconsider this aspect.¹⁷³ The authors opine that this would indeed be worthwhile.

The distinction in source of liability also applies to personal liability on the basis of tort with the exception of malpractice. For this liability the Proposal also refers to the law of obligations. A hurdle like the multi-party construction, is not necessary for liability on the basis of tort as the tortious acts of the partners themselves would constitute the ground for a personal liability claim under the law of obligations. This means that partners are not personally liable for the torts committed by their fellow partners that can be attributed to the partnership. A deviating rule applies to torts that

¹⁶⁸ Reaction of Gitmans related to a question asked by Stokkermans during the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 12.

¹⁶⁹ Liability for equal parts into joint and several liability.

¹⁷⁰ JB Wezeman and HE Boschma (n 82) 203.

¹⁷¹ Art 6:74 jo. 75 DCC.

¹⁷² Question of Stokkermans during the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 6.

¹⁷³ Reaction of Raaijmakers relating to a question asked by Stokkermans during the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 7.

are committed while executing professional activities under a service agreement. In that situation, liability for tortious acts is covered by partnership law. This has two implications. The first implication is the fact that partners who are assigned to the contract are liable unless an exculpation exists. They would have to prove that the exculpation would apply in case they have not acted or when their behaviour does not constitute the tort (liability unless) whereas in the law of obligations the partner that did not commit the tort is not liable (no liability) and the claimant would have to furnish facts and would have the burden of proof to claim otherwise. The other difference is that when it is unclear to whom the assignment was charged, every partner may become involved in legal proceedings. Although these partners can also (potentially) make use of the exculpation by proving that the tortious act cannot be attributed to him/her, they can still become involved due to a claim on the basis of personal liability. Although there seems to be less reason to include the liability for tort in partnership law than in relation to the breach of contract, a liability regime fully included in partnership law would make it more clear especially when a limitation is part of the liability rule in partnership law.

b. Professional and non-professional activities

The Proposal still includes a difference between non-professional and professional activities which in the authors' opinion is nowadays and in relation to the proposed rules of representation no longer justified. This difference applies to the personal liability of partners for the divisible obligations of a partnership to perform other than the performance of professional activities. This means that, for instance, when a partnership enters into an agreement to rent an office, partners of a professional partnership will be liable for paying the rent in equal parts, whereas partners of a general partnership will be jointly and severally liable. The logic behind this - other than that the Working Group did not want to make the liability rules for partners of a professional partnership more severe than the current rules - is unclear. An argument based on a difference in the representations rules is not relevant because these rules are made equal for both the professional partnership and the general partnership¹⁷⁴ In addition, the dividing line between professional and non-professional activities is blurred and reasons for this distinction that were mentioned in parliamentary history, such as the fact that historically professionals were not focused on profits and were hired because of their personal qualities, are not as relevant anymore as currently it is not uncommon that professionals also focus on making profits and other non-professional workers are hired because of their qualities as well.¹⁷⁵ Moreover, this liability rule does not concern liability for the *professional* activities based on service agreements but liability for obligations concerning non-professional activities, which are divisible. The majority of the arguments for a distinction used by the Working Group cannot be applied to

¹⁷⁴ IS Wuisman (n 21) 33-57, IS Wuisman (n 21) 9.

¹⁷⁵ *ibid.*

agreements that relate to non-professional activities, i.e. the quality of a professional and the relationship with his/her client is not relevant for the obligations connected to these non-professional activities, for instance renting an office.¹⁷⁶ The Working Group mentioned that the members did discuss this aspect during their deliberations. To a question whether the difference is justified, the Working Group answered that it is the consequence of the decision that had been made. It added that one could discuss this in length and finally come back to the fundamental discussion whether there is reason to make a distinction between professional and non-professional activities.¹⁷⁷ Although, the liability difference between a professional partnership and a general partnership not related to service agreements only concerns the liability for divisible non-professional activities and therefore could be considered of subservient meaning, it is a difference which should be reconsidered. The other liability difference that is related to the distinction between professional partnership and general partnerships is the possibility of limitation of liability.¹⁷⁸

Although the idea of introducing the possibility of limiting the liability should be supported¹⁷⁹, in the Proposal this limitation is only available for breach/failure in relation to professional activities. During the conference about the first draft of the Proposal held in 2016, it was mentioned by the Working Group that this narrow scope was more or less a decision determined by Dutch tax law and that the Working Group did not have fundamental objections against a full shield liability regime. Because of foreseeable fiscal difficulties in combination with the availability of a flexible limited liability company and a necessary introduction of creditor protection rules which are unknown to Dutch partnership law, the Working Group decided not to proceed with such a regime.¹⁸⁰ The availability of the flexible limited liability company is in our view not a decisive argument against the introduction of a partnership with limited liability as is the latter argument relating to protection rules. In the Proposal the chosen limitation rule in partnership law in combination with the limitation of liability for tort which arises because of the distinction in source of liability, should perhaps also be reconsidered as creditor protection rules related to these limitations is actually lacking.¹⁸¹ The Dutch fiscal approach of taxation of

¹⁷⁶ See also question of Stokkermans during the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 11.

¹⁷⁷ Reaction of Gitmans on a question by Stokkermans during the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 12.

¹⁷⁸ Art 19(3) Proposal.

¹⁷⁹ IS Wuisman, *Een personenvennootschap met beperkte aansprakelijkheid: wenselijk?* (Serie Uitgaven vanwege het Instituut voor Ondernemingsrecht nr. 81, Kluwer, Deventer, 2011).

¹⁸⁰ Contribution of Van Veen during the debate of the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage I – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (ZIFO-reeks 21, Wolters Kluwer, Deventer 2016) 13.

¹⁸¹ See also: BF Assink (n 167) in *Naar een nieuwe regeling voor de personenvennootschappen* (ZIFO-reeks 21, Wolters Kluwer, Deventer 2016) 59-75.

business forms may be a more severe impediment to the introduction of such a new business form and is in need of transformation.¹⁸²

Restructuring Options

During its course of life there may be a need for restructuring of the partnership. Under current law, the options are restricted to 'light' types of restructuring, such as (i) a change in the membership base as a result of the entry or exit of partners and (ii) a change to another type of partnership. The Proposal of the Working Group has much more to offer. Firstly, it facilitates the entry and exit of partners and also contains a legal basis and regulation for the change to another type of partnership. Moreover, the Proposal provides for new, 'heavy' types of restructuring, such as the conversion of a partnership to a B2DCC-legal person (and vice versa), the legal merger between partnerships and the division of partnerships. The key concept in this context is: separate legal personality. The new restructuring possibilities are only offered to public partnerships with a separate legal personality.¹⁸³

Facilitation of 'Light' Types of Restructuring

The Proposal facilitates the entry and exit of partners. First of all the exit of a partner no longer leads to the dissolution of the partnership as a whole, but only to a partial dissolution in relation to the exiting partner.¹⁸⁴ Moreover, the public partnership/legal person itself is and remains owner of the property. A financial settlement between the partnership and the leaving partner suffices.

The Proposal also offers a facility for the situation where only one partner remains after leaving of his fellow partner(s). Although this leads to a complete dissolution of the partnership,¹⁸⁵ this does not necessarily mean the end of the business of the partnership. The partners may agree that one of the former partners will continue the enterprise of the partnership under the same trade name in the form of a Sole Proprietorship.¹⁸⁶ With effect from the day following the day on which the dissolution of the partnership with simultaneous continuation of its activities is registered with the Commercial Register, the partnership shall cease to exist and its

¹⁸² IS Wuisman (n 180) 409-410; SA Stevens, 'Een nieuw fiscaal regime voor personenvennootschappen gewenst!', in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 99-109; and Contribution of Essers during the debate of the conference 'Naar een nieuwe regeling voor personenvennootschappen held in 2016: Bijlage 1 – Verslag van de discussie, in *Naar een nieuwe regeling voor de personenvennootschappen* (Wolters Kluwer 2016) 10, 13.

¹⁸³ This is explicitly determined for the legal merger and division in art 40 Proposal. For the conversion this follows implicitly from the art 34, 35 and 36 Proposal.

¹⁸⁴ Art 24 Proposal.

¹⁸⁵ Art 28(1)(c) Proposal.

¹⁸⁶ Art 31(1) Proposal.

assets shall be transferred to the continuing partner under universal title of succession.¹⁸⁷

Another form of restructuring concerns the change of a partnership to another type of partnership. For example, a general partnership changes its form to a limited partnership after the entry of a limited partner. The reverse situation can also occur: the limited partnership becomes a general partnership after the exit of the sole limited partner. Although such ‘type changes’ are possible according to the prevailing doctrine, current law offers no legal basis and regulation.

The Proposal fills this gap by providing a legal basis¹⁸⁸ and a regulation for the change to another type of partnership. It is explicitly stipulated that such a transformation does not terminate the existence of the partnership and its (possible) status as a legal person.¹⁸⁹

The Proposal contains specific liability rules for the aforementioned ‘light’ types of restructuring. These rules will be discussed below.

New ‘Heavy’ Types of Restructuring

Conversion

The most innovative form of restructuring the Proposal offers, is probably the conversion of a public partnership/legal person into a B2DCC-legal person (and vice versa). The conversion comes into effect by the execution of a notarial deed and does not terminate the existence of the legal entity.¹⁹⁰ All assets and liabilities remain with the legal entity.

Since the conversion into another legal form affects the position of the participants, the Proposal offers statutory protection to the participants. If partners wish to convert the public partnership into a B2DCC-legal person, unanimous consent is required unless the partnership agreement provides that a decision to convert the public partnership can be taken by the majority of the partners. In the latter case, each partner who has not consented to the conversion is authorized to opt out within one month after the decision to convert has been taken. In view of this, the notarial deed required to effect the conversion can only be executed after the expiration of the one-month term.¹⁹¹

¹⁸⁷ Art 31(2) Proposal.

¹⁸⁸ Art 33(1) Proposal.

¹⁸⁹ Art 33(2) Proposal.

¹⁹⁰ Art 34(5) and art 35(6) Proposal.

¹⁹¹ Art 34(3)(4) Proposal.

For the reverse situation in which a B2DCC-legal person is converted into a public partnership, the Proposal provides that shareholders or members who have not agreed to the decision to convert will not become a partner in the public partnership.¹⁹² They are thus protected against becoming a partner in a public partnership with the connected personal liability of partners towards creditors. There is, however, an arrangement for partners who regret their initial choice: within one month after the resolution has been taken, a shareholder or member can still agree to the conversion and become a partner in the public partnership.

Shareholders and members who do not become partners in the public partnership are entitled to compensation for the loss of their share or membership. This compensation is determined by one or more independent experts. However, the appointment of experts can be omitted if the articles of association or an agreement in which the legal entity to be converted and the shareholders or members concerned are party, contain a clear criterion on the basis of which compensation can be determined.¹⁹³

After the conversion of a B2DCC-legal person into a public partnership, the partners are only bound for debts and obligations to which the partnership has committed itself and which have become due after the conversion.¹⁹⁴

Legal Merger

The Proposal also allows the public partnership/legal person to merge with one or more other partnerships with separate legal personality.¹⁹⁵ The acquiring partnership acquires under universal title of succession all the assets and liabilities of one or more other partnerships that cease to exist at the moment of the merger. The partners of the partnership that ceases to exist become partners in the acquiring partnership.

The merger procedure is laid down in article 37 Proposal. Creditors of the public partnerships that are involved in the merger do not have a right of objection. This was not deemed necessary in view of the (continuing) personal liability of the partners of the partnerships involved in the merger.

The legal merger procedure is divided into four phases. In the first, preparatory phase, a joint merger proposal is drawn up by the merging partnerships.¹⁹⁶ This proposal must contain specific information, such as the rights and obligations of the partners after the merger. In the subsequent second phase, each of the merging

¹⁹² Art 5(3) Proposal.

¹⁹³ Art 35(4) Proposal.

¹⁹⁴ Art 35(5) Proposal.

¹⁹⁵ Art 37(1) jo art 40 Proposal.

¹⁹⁶ Art 37(2) Proposal.

partnerships has to decide on the proposed merger.¹⁹⁷ In the third phase, a partner who has not agreed to the merger is allowed to exit the partnership and claim an exit compensation. This must be done within one month after the merger resolution has been taken.¹⁹⁸ In the fourth and final phase, the merging partnerships draw up a joint written statement that is registered with the Commercial Register. It should be noted that notarial intervention is not required to effect the merger. The merger will take effect on the day following the day on which it is registered with the Commercial Register.

Division

Finally, the Proposal provides for division of a public partnership with separate legal personality, which can take the form of a split-up (full division) or a split-off (partial division).¹⁹⁹ In the event of a split-up, all the assets and liabilities of the public partnership being divided, are transferred under universal title of succession to at least two other public partnerships. The public partnership being divided ceases to exist.²⁰⁰ With a split-off, the public partnership continues to exist whereas parts of its assets and liabilities are transferred under universal title of succession to one or more public partnerships.²⁰¹ The general rule is that the partners of the partnership being divided, become partners of the acquiring partnership(s). There are two exceptions to this rule. The first is that a partner exits on the occasion of the division.²⁰² The second exception is that the different partners agree to become partners in different acquiring public partnerships with legal personality.²⁰³ The procedure of division follows the same pattern as that of a legal merger, discussed above.

Liability and Restructuring

Liability and 'Light' Types of Restructuring

The Proposal contains several specific liability rules which apply to acceding partners and exiting partners, as set out above. The Proposal also contains a clear regulation on the liability of partners when the type of partnership changes. Partners will remain liable for the debts of the partnership incurred before the change, on the same basis as they were liable before the change into another type of partnership.²⁰⁴

¹⁹⁷ Art 37(3) Proposal.

¹⁹⁸ Art 37(4) Proposal.

¹⁹⁹ Art 38-41 Proposal.

²⁰⁰ Art 38(3) Proposal.

²⁰¹ Art 38(4) Proposal.

²⁰² Art 38(8) Proposal.

²⁰³ Art 38(3) Proposal.

²⁰⁴ Art 33(3) Proposal.

However, in the event a general partner becomes a limited partner his/her remaining liability for debts is subject to a term of limitation with a maximum of five years.²⁰⁵

If a limited partner becomes a general partner, the regime that applies to an acceding partner will apply *mutatis mutandis*, which means that such a partner is only liable for performance to which the partnership has committed itself and that have become due after (s)he became a general partner.²⁰⁶

Liability and 'Heavy' Types of Restructuring

Conversion

With regard to the conversion of a public partnership into a B2DCC-legal person, the following rules are included in the Proposal. The former partners will remain liable for partnership's debts and obligations that arose before the conversion into a B2DCC-legal person. Claims against former partners can only be asserted until prescription of the claim against the legal entity and in any event before a five year term has passed after the registration of the conversion with the Commercial Register. If the claim arises after the aforementioned registration, then the term of limitation will commence at that time.²⁰⁷

For the reverse situation in which a B2DCC-legal person is converted into a public partnership, the Proposal provides that the partners are only bound for debts and obligations to which the partnership has committed itself and which have become due after the conversion.²⁰⁸ They are not liable for the obligations of the legal entity that existed before the conversion.

Legal Merger

In the case of a merger between two or more public partnerships/legal persons, the partners of the partnership that ceases to exist become (new) partners in the acquiring partnership. They are liable for the debts of the acquiring partnership on the same basis as the other, 'old' partners. According to the Working Group, there is no reason to limit the liability of persons that become partners of an acquiring partnership as a result of a merger. Therefore, it is explicitly stated that the limitation rule of Article 19(4) of the Proposal does not apply in case of merger.²⁰⁹

Division

²⁰⁵ Art 23(1) Proposal.

²⁰⁶ Art 23(2) in conjunction with art 19(4) Proposal.

²⁰⁷ Art 34(3) Proposal.

²⁰⁸ Art 35(5) Proposal.

²⁰⁹ Art 37(8) Proposal. Werkgroep Personenvennootschappen (n 3) 134.

In the Proposal, a separate article is devoted to the liability of the partnership and the partners in case of division of the public partnership. In order to protect the interests of the creditors of the partnership, Article 39 of the Proposal contains the following provisions. First of all, the acquiring public partnerships and the divided public partnership that does not cease to exist, are liable for the obligations of the divided public partnership existing at the time of the division.²¹⁰ When the obligation is non-divisible, such as an obligation to act, the acquiring public partnerships and the divided public partnership that does not cease to exist are each jointly and severally liable for the entire obligation.²¹¹ When the obligation is divisible, such as an obligation to pay an amount of money, the acquiring partnership to which the obligation has been transferred, or, if the obligation has not been transferred to an acquiring public partnership, the divided public partnership that does not cease to exist is liable for the entire obligation. The liability for divisible obligations of any other public partnership involved at the division is limited to the value of the property (assets and liabilities) that it has acquired or retained on the occasion of the division.²¹² Furthermore, a subsidiarity rule applies: other public partnerships than the public partnership to which the obligation has been passed or, if the obligation continues to rest on the dividing public partnership, do not have to perform that obligation before the last-named public partnership has failed in the fulfilment of this obligation.²¹³

Persons that become (new) partners in the acquiring partnership must be aware that they are liable for the debts of the acquiring partnership on the same basis as the other, 'old' partners. According to the Working Group, there is no reason to limit the liability of persons that become partners of an acquiring partnership as a result of a division. Therefore, it is explicitly stated that the limitation rule of Article 19(4) Proposal does not apply in case of division.²¹⁴

Concluding Part on Proposed Liability Regime in Case of Restructuring

In the authors' opinion, the Working Group has succeeded in including clear and balanced liability rules for both 'light' and 'heavy' types of restructuring in the Proposal. In particular, the proposed liability regime for acceding partners should be welcomed, as the current rule that acceding partners are liable for obligations existing before the entry discourage new partners to join the partnership and may lead to costs and fiscal complications if the partners decide to dissolve the partnership and establish a new partnership in order to avoid liability risks. Further, it can be considered an improvement that the Proposal introduces a special provision in partnership law relating to the liability of the former partners. This provision

²¹⁰ Art 39(1) Proposal.

²¹¹ Art 39(2) Proposal.

²¹² Art 39(3) Proposal.

²¹³ Art 39(4) Proposal.

²¹⁴ Art 39(6) Proposal. Werkgroep Personenvennootschappen (n 3) 134.

would replace the application of the various limitation periods that can be found in property law that apply to the current regime. The Proposal also contains clear and proper provisions for the liability of partners when the type of partnership changes. It thus fills a gap, because current law does not contain any legal regulation on this point. Finally, we agree with the clear and proper liability provisions which are introduced with regard to the new types of restructuring, such as the conversion, legal merger, and division.

Conclusion

Dutch partnership law is in need of modernisation. The Working Group has presented a valuable approach to a new set of rules. Many aspects of the Proposal will benefit society and make the partnership more attractive as a business form. The legal personality and related options for restructuring are a welcome change. The chosen liability regime can, however, be confusing as result of the distinction between obligations into two categories. The first category (legal acts) is governed by partnership law and the second (obligations arising out of law) by the law of obligations with the exception for breaches and torts related to professional activities. The objective of the new Proposal to put all the rules together in one act to add clarity and make it less complicated has been put under pressure by the liability regime. Certain aspects could be reconsidered so that the liability rules would fit with the other rules of the Proposal that will make partnership law future proof again.