

# SCHOUPS

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## **TCC's can henceforth go bankrupt**

The new insolvency law entered into effect on 1 May 2018. Concretely, a new Book XX on the insolvency of enterprises was inserted into the Economic Law Code. The Bankruptcy Act and the Continuity of Enterprises Act were repealed.

One of the most important elements of this reform is the broadening of the scope of application. In addition to any legal entity, any other organisation without legal personality having an intention to distribute profits or which de facto does make such distributions to its members is also regarded as an enterprise to which the new insolvency law applies.

This means that companies without legal personality, such as a temporary commercial company (TCC) and a partnership [maatschap], can henceforth be declared bankrupt. The legislature justifies this expansion by referring to the for-profit character of these companies. Moreover, it is generally accepted that a TCC possesses common property to which the rules concerning joint ownership apply, so that it is useful to acknowledge the independence thereof in the insolvency law.

Formerly it applied as a rule that only the partners of a TCC could be declared bankrupt. Given that the bankruptcy of any one of the partners in principle leads to the dissolution of the TCC, a survivorship clause is often incorporated into the articles of association. On this basis, in the event of bankruptcy of one of the partners, the TCC is continued by the other partners. The TCC itself, however, thus remained out of reach of the old insolvency law. The TCC could not be declared bankrupt and also could not call upon the procedure of judicial reorganisation. This is changing as of 1 May 2018.

In order to enable the financial winding up to be conducted as smoothly as possible, a number of rules are provided that are designed to ensure maximum involvement of the individual partners of the TCC in the insolvency proceeding. In this way, for example, one avoids that a TCC should be declared bankrupt while a partner (who is jointly and severally liable for the company debts) still has sufficient assets to settle the liabilities of the TCC. In so far as the TCC consists of reliable and solvent partners, in practice it is very unlikely to go bankrupt . . .

However, the bankruptcy of a TCC does not automatically entail the bankruptcy of the partners involved. With this the legislature departs from the prevailing Cassation case-law. Thus henceforth one will have to examine per individual partner whether the bankruptcy conditions are fulfilled. It is possible that several insolvency proceedings will be running at the same time, e.g. a bankruptcy proceeding at the level of the TCC and a judicial reorganisation proceeding at the level of the partners.

For more information on this subject, you can always contact Joost Bats and Siegfried Busscher (the authors).

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