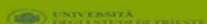


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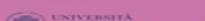


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ITALIAN AND EUROPEAN COMPANY LAW

AA 2021/2022

PARTNERSHIPS
VS
COMPANIES

2247 CC. CONTRATTO DI SOCIETÀ

Con il contratto di società due o più persone conferiscono beni o servizi per l'esercizio in comune di un'attività economica allo scopo di dividerne gli utili.

By means of a deed of incorporation of a company or partnership, two or more parties contribute goods or services for the joint exercise of an economic activity in order to share the profits.

Art. 2086 c.c. – Gestione dell'impresa

[I]. L'imprenditore è il capo dell'impresa e da lui dipendono gerarchicamente i suoi collaboratori.

[II]. L'imprenditore, che operi in forma societaria o collettiva, ha il dovere di istituire un assetto organizzativo, amministrativo e contabile adeguato alla natura e alle dimensioni dell'impresa, anche in funzione della rilevazione tempestiva della crisi dell'impresa e della perdita della continuità aziendale, nonché di attivarsi senza indugio per l'adozione e l'attuazione di uno degli strumenti previsti dall'ordinamento per il superamento della crisi e il recupero della continuità aziendale.

- duty to establish an organizational, administrative and accounting structure
- adequate to the nature and size of the company
- also in function of the timely detection of the crisis of the company and the loss of continuity
- take immediate action for the adoption and implementation of one of the tools provided by the law for overcoming the crisis and recovering business continuity

PATRIMONIAL AUTONOMY

LEGAL PERSONALITY

VS

LEGAL SUBJECTIVITY

In partnerships the assets of the entity are *partially* segregated from the assets of the members, rather in companies the assets of the company are *fully* segregated. That means essentially, from the point of view of the liabilities, that in companies the members (shareholders or quotaholders) are never liable for the company's debts, whilst the partners of a partnership (with the exceptions we will study) can be held liable for the partnership's debts.

PARTNERSHIPS – SOCIETA' DI PERSONE

- SIMPLE PARTNERSHIP (SOCIETA' SEMPLICE – S.S.)
- GENERAL PARTNERSHIP (SOCIETA' IN NOME COLLETTIVO – S.N.C.)
- LIMITED PARTNERSHIP (SOCIETA' IN ACCOMANDITA SEMPLICE – S.A.S.)

JOINT STOCK COMPANIES – SOCIETA' DI CAPITALI

- COMPANY LIMITED BY SHARES (SOCIETA' PER AZIONI – S.P.A.)
- LIMITED LIABILITY COMPANY (SOCIETA' A RESPONSABILITA' LIMITATA – S.R.L.)
- LIMITED PARTNERSHIP BY SHARES (SOCIETA' IN ACCOMANDITA PER AZIONI – S.A.P.A.)

- Who can be partner/shareholder/quotaholder?
- Is it admitted to have a sole partner/shareholder/quotaholder?

- In general not only natural persons, but also partnerships or companies can be partner/shareholders/quotaholders
- It is possible to have companies (limited liability companies or companies limited by shares) with only one shareholder/quotaholder, whilst plurality of members is fundamental for partnerships (otherwise there is a cause of dissolution)

SIMPLE, GENERAL, LIMITED PARTNERSHIPS

General remarks

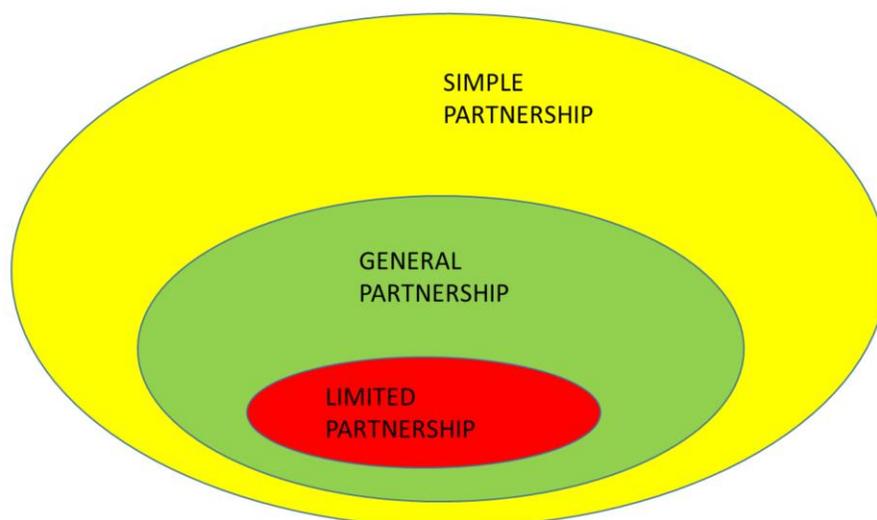
- No “corporate” model nor «assembly» method
- Liability of members
- Every member having unlimited liability is director and has the power of legal representation
- Unanimous consent to amendments

SIMPLE PARTNERSHIP

GENERAL PARTNERSHIP

LIMITED PARTNERSHIP

APPLICABLE RULES...



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Every typology of partnerships has its own legal framework but, for the aspects not disciplined, the rules set forth by the Civil Code for the simple (ordinary) partnerships apply to the general partnership (artt. 2293 Civil Code) and the rules set for the general partnership apply to the limited partnership, if compatible (2315 Civile Code).

SIMPLE PARTNERSHIP

- General remarks
- Contributions
- Participation in profits and losses
- Management
- Representation
- Liability

SIMPLE PARTNERSHIP

GENERAL REMARKS

- No commercial business
- No particular requirements of form for the deed of incorporation
- Amendments only unanimously

- Simple partnerships cannot carry out commercial activities, rather general and limited partnerships can carry out both commercial and agricultural business
- Regarding simple partnership no special form is needed for the deed of incorporation (unless it is required by the contributions, i.e. real estate), that means that the «contract» could be also oral or de facto (but some basic informations must be filed with the Business Register)
- To change the contract of partnership the unanimous consent of every partner is needed (difference with companies)

SIMPLE PARTNERSHIP

CONTRIBUTIONS

What is necessary to realise the business purpose

- TANGIBLE ASSETS
- ENJOYMENT OF RIGHTS
- RECEIVABLES
- WORK

The contributions represent the participation of every partner in the partnership. They are formed by assets that every partner gives to the partnership in order for it achieve to the business purpose. They represent the investment in the common business activity. Once I have given a certain asset as contribution to the partnership it ceases to be mine. Contribution can be made with different assets: for partnership they can be tangible (i.e. real estates, cars, machinery, money, etc.) or not. For example I can participate in the partnership by contributing in form of giving the possibility to enjoy an asset that is mine, or by working for the partnership, or selling receivables. If intangible assets become impossible (i.e. it is not possible for the partner to work anymore or the receivable are not paid we can have the exclusion of the partner). As far as partnerships are concerned, no minimum capital is required.

SIMPLE PARTNERSHIP

PARTICIPATION IN PROFITS AND LOSSES

- Articles of association
 - Leonine pact
- Proportional
- Equally

The leonine pact is a pact in which a partner is totally excluded from the profits or the losses of the partnership. That pact is invalid.

As far as the participation in profits and losses is concerned, stated the invalidity of the leonine pact, than it is free for the partners to decide which part in profits and losses every partner should have. We could find than in the articles of association (the contract among the parties) rules regarding the distribution.

Should no specific rules be set in the deed of incorporation, the profits will be distributed proportionally to the amount of contributions made. If the value of the contributions is not specifically set, than profits will be distributed equally.

Same rules apply for losses.

SIMPLE PARTNERSHIP

MANAGEMENT

Art. 2257 - Amministrazione disgiuntiva. (testo riformato dal d.lgs. N. 14 del 2019)

[I]. L'istituzione degli assetti di cui all'articolo 2086, secondo comma, spetta esclusivamente agli amministratori. Salvo diversa pattuizione, l'amministrazione della società spetta a ciascuno dei soci disgiuntamente dagli altri.

[II]. Se l'amministrazione spetta disgiuntamente a più soci, ciascun socio amministratore ha diritto di opporsi all'operazione che un altro voglia compiere, prima che sia compiuta.

[III]. La maggioranza dei soci, determinata secondo la parte attribuita a ciascun socio negli utili, decide sull'opposizione.

SIMPLE PARTNERSHIP

MANAGEMENT

- Unlimited liability = management and representative
- Jointly or severally
- Powers and duties
- Ius prohibendi

MEMBERS' SUPERVISION

Management means essentially the power to perform every act that falls within the business purpose.

Every partner with unlimited liability has the power to manage the partnership and to represent it vis a vis third parties.

We need to have rules regarding the decision-making process of the partnership (who is entitled to form the partnership's will?) and the expression of that will vis a vis third parties (who can act on behalf of the partnership?).

Decision making process – Management. We can have several or joint management (if nothing is stated in the articles of association, the law provides for the several management).

Several management: each managing partner can perform every act that falls within the business purpose without the prior consent of other partners. The latter can oppose, but only before the act has been performed. In this case, in order for the transaction to be performed, we need the favorable vote of the majority of the partners, calculated on the participation on profits.

If on the contrary we have a jointly management, then every decision must be taken with unanimous consent.

The articles of association can provide also for a «mixed» management.

Whatever rule is adopted, every managing partner can perform every urgent act that is needed in order to avoid a prejudice to the partnership.

SIMPLE PARTNERSHIP

REPRESENTATIVE POWER

- Articles of association ...
- Every managing partner
- Object
- Limits/revoke: 1396 c.c. – Business Register

The power to represent the partnership (to act on behalf of it) is given to every managing partner and covers every act within the business purpose, unless a different rule is stated in the article of association. Modifications and cessations of that power are governed by art. 1396 c.c.: they (modifications and revoke) should be made knowable by third parties with adequate means, otherwise they are not enforceable, unless it is proven that the third party was aware of it. Other causes of cessation are not enforceable vis a vis third parties, who did not know about them with no fault.

SIMPLE PARTNERSHIP

LIABILITY

- Partnership's creditors  partners
- Some or all partners? 2267 c.c.
- Beneficium excussionis (2268 c.c.)
- New partner?
- Partner's creditor (profits and liquidation of the quota)
- Sale of the quota

In case the partnership's assets are insufficient to satisfy the creditors' claims, the creditors can seek satisfaction of their claims out of the partners' assets.

Every partner is liable unless differently stated in the articles of association and the limitation must be knowable to third parties (with suitable means).

Beneficium excussionis: the creditors can act directly against the partner's assets, unless the partner indicate the partnership's assets on which the creditor can easily satisfy (different from general partnerships).

The new partner of the partnership becomes liable also for the previous obligations. The partner who ceases, remains liable for the obligations created since the day of the cessation of its role (deriving from affairs performed until that day).

The partner's creditors can satisfy their claim on the quota, but until the partnership ending term is not passed, they can only perform conservative acts, unless other assets of the debtor are insufficient, therefore they can ask the dissolution of the participation.

GENERAL PARTNERSHIP

- GENERAL REMARKS
- REPRESENTATION
- PROFITS AND LOSSES
- LIABILITY

We will study specific rules for the general partnerships: for all what is not specifically disciplined, the rules of simple partnership apply (2293 c.c.)

GENERAL PARTNERSHIP

GENERAL REMARKS

- Rules of SIMPLE PARTNERSHIP are **applicable**
- Entry in the Business Register
 - what happens if not...? 2297 C.C.
- Article of association
 - capital
- Non-compete obligation (2301)

Regular general partnership is the one filed with the Business register. To it must be applied the whole legislative framework. If we have an irregular general partnership (which is not registered) then we apply the simple partnerships' rules regarding the relations amongst partners and third parties BUT – as for regular general partnerships – partners are always liable.

More stricted rules regarding the articles of association: form and content. In particular, among other informations, the amount of the capital must be stated.

2301: the partner cannot perform the same activity as a sole business man or for competitors

GENERAL PARTNERSHIP

REPRESENTATION

- General
 - Limits

In the deed of incorporation should be stated which directors have the power of acting on behalf of the partnership (representative power).

The directors who have the representative power can perform every act within the business purpose, unless the deed of incorporation or the proxy provide for limitations. Any limitation can be enforceable vis a vis third parties only if it is filed with the business register or it can be proven that the third party was aware of it.

GENERAL PARTNERSHIP

PROFITS AND LOSSES

- LIMITS
 - profits

Dividends can be distributed only if the profit is «real» (surplus).
If losses happen which affect the partnership's capital, any dividend may be distributed until the capital is restored or reduced.

GENERAL PARTNERSHIP

LIABILITY

- Of partners: beneficium excussionis (≠ simple partnership)
- Partner's creditor

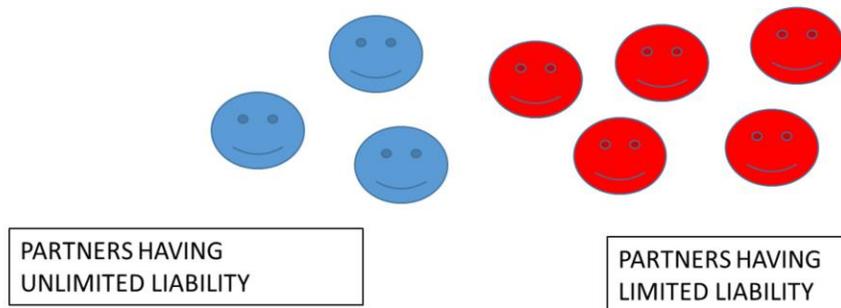
Every partner is unlimited liable for the partnerships' debts: no exception!
It is not possible therefore for the partners to exclude someone's liability.
The beneficium excussionis exists and it is differently regulated: the partnership's creditors may take action against the partners only after they have sought for compensation out of the partnership and they have not been satisfied.
As far the partner's particular creditors are concerned, they cannot ask the liquidation of the quota until the partnership's term is not expired.

LIMITED PARTNERSHIP

- PARTNERS, MANAGEMENT AND LIABILITY
- GENERAL REMARKS

LIMITED PARTNERSHIP

PARTNERS, MANAGEMENT AND LIABILITY



In limited partnerships we have two different categories of partners: the ones with limited liability and the ones with unlimited liability.
The business name must consist of the name of at least one partner with unlimited liability.

LIMITED PARTNERSHIP



PARTNERS HAVING UNLIMITED LIABILITY

- Manage the partnership
- Are personally, jointly and severally liable

Partner with unlimited liability are entitled with the management power and are personally liable for the partnership's debts

LIMITED PARTNERSHIP



PARTNERS HAVING LIMITED LIABILITY

- Don't manage the partnership
- Are liable only for the contributions

Partners with limited liability cannot manage and are not personally liable for the partnership's debts

LIMITED PARTNERSHIP

WHAT HAPPENS IF



PARTNERS HAVING LIMITED LIABILITY



- manage the partnership

or

- let their name been filed in the partnership's name?

THEY HAVE UNLIMITED LIABILITY FOR ALL THE DEBTS

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If a partner with limited liability performs any act of management becomes unlimited liable, for every debt, not only for the obligations arising from the act which was done. Same is if the partner lets their name be used in the business name (implicit or explicit consent).

It is possible, for partners with limited liability, to perform single acts of management only with a special power of attorney and under directors' directives.

The partners with limited liability have the power of inspection.

LIMITED PARTNERSHIP

GENERAL REMARKS

- Applicable rules of general and simple partnerships
- Transfer/sale of the quota

Regarding the sale of the quota, whilst for general partnerships it is necessary to have the unanimous consent of every partner, in limited partnerships we must distinguish between the quotas of the partners with unlimited liability and the ones of the partners with limited liability. As far as the latter are concerned, the transfer of the quotas inter vivos requires only the approval of the majority of partners and mortis causa is free, whereas for the ones who have unlimited liability the unanimous consent is required.

WINDING-UP

CAUSES

ALL

- Term expiry (unless it is prorogated)
- The purpose of the partnership is realised or there is the ascertained impossibility of its realisation
- Decision of the partners
- Sole partner (6 months +)
- Causes in articles of association
 - S.N.C.
- Bankruptcy
- Request of liquidation of the quota by a partner's creditor (in case of prorogation)
 - S.A.S.
- Only a category of partners

Winding up represents the situation in which the partnership «starts to stop», then we have the liquidation procedure and at the end the cancellation from the Business Register (if the partnership is registered).

WINDING-UP

Common rules

- Managing partners > only urgent acts
- Liquidators (S.S. vs S.N.C. and S.A.S.)
- Cancellation

Once a cause of winding-up occurs, the partnerships starts the liquidation procedure. The directors can perform only urgent acts and the liquidators must be appointed (deed of incorporation/decision of the partners/Court).

The liquidators have the representative power and the power to perform every act that is needed to liquidate the partnership, but it is prohibited to start new operations.

They receive from the directors documentation and goods.

Their first goal is to satisfy the partnerships' creditors: they namely cannot distribute assets to the partners unless they have previously paid back the creditors. If the partnerships' assets are insufficient, they can ask to the partners.

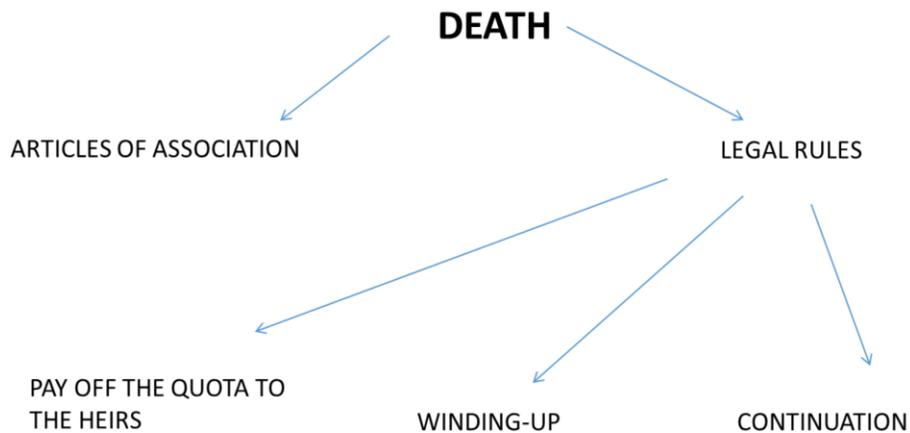
Only after the creditors have been paid, the surplus is given to pay back the contributions and distributed to the partners.

More stricted rules regarding the performing of the liquidation procedure are given by the law for s.n.c. and s.a.s., in particular the duty to draft the liquidation balance sheet and its approval.

TERMINATION OF THE PARTICIPATION

- DEATH
- WITHDRAWAL
- EXCLUSION

TERMINATION OF THE PARTICIPATION

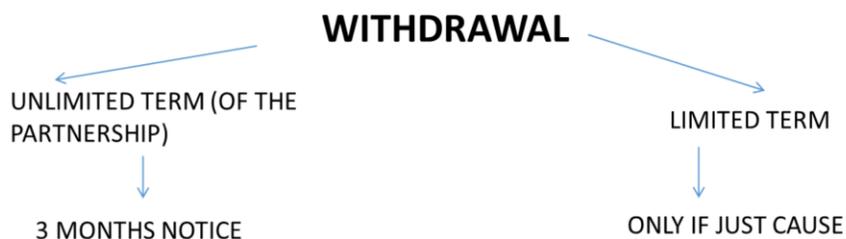


What happens in case of death of one partner?

We must check if in the articles of association a specific rule was provided.

If not, the legal rules apply which state that the remained partners should liquidate the quota of the dead partner, unless they prefer to wind up the whole partnership or to continue it with the heirs (if they agree).

TERMINATION OF THE PARTICIPATION



The withdrawal right is the right to abandon the partnership and cease to be partner of it.

It has to be distinguished between partnership without term expiry and the ones with it. In the first case the withdrawal right is given to every partner with three months notice. Same rule applies in case of tacit prorogation.

In the second case withdrawal right is possible only if a just cause occurs. In this case the intention must be communicated to the other partners and it immediately effective. Different reasons of withdraw can be stated in the deed of incorporation.

TERMINATION OF THE PARTICIPATION

EXCLUSION

- Failure to fulfill obligations
- Disqualified/ debarred
- Contributions impossible

Automatic if:

- Bankruptcy declaration
- The creditors have obtained the liquidation of the quota

When specific causes occur, the partners can exclude one of them from the partnership.

TERMINATION OF THE PARTICIPATION

EXCLUSION

- Majority of partners
- Notification
- Possible opposition

The exclusion must be decided with the favourable vote of the majority of the partners and must be notified to the partner, who has the possibility to oppose. In this case a trial begins.

TERMINATION OF THE PARTICIPATION

LIQUIDATION OF THE QUOTA

- Determined on the basis of the financial situation of the partnership on the termination date

LIABILITY OF THE TERMINATED PARTNER

For obligations aroused until the date of the termination

Termination is enforceable only if made knowable with adequate means

- De facto partnership
 - Vs
- Hidden partnership
 - Vs
- Apparent partnership