Italian Company Law

Partnerships

Italian and European Company Law
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Introduction: partnerships and companies

Under Italian Company Law there are two main categories of legal entities which may be incorporated: partnerships and companies.
Partnerships may be set up in three forms: simple partnership (società semplice), general partnership (società in nome collettivo, s.n.c.) and limited partnership (società in accomandita semplice, s.a.s.).
Companies may be set up in three forms: company limited by share (società per azioni, s.p.a.), partnership limited by shares (società in accomandita per azioni, s.a.p.a.) and company limited by quotas (società a responsabilità limitata, s.r.l.).
Italian Company Law provide another kind of company named cooperative company (società cooperative); this company can be distinguished from the other companies for the purpose (i.e., the mutualist scope).
Even if there are different kind of partnerships and companies, the legal definition of the partnership/company (agreement) is the same and it is provided by the art. 2247 c.c.: «By a partnership/company agreement two or more persons contribute goods or services for the joint exercise of an economic activity in order to share the profits deriving therefrom».
Companies are associative entities with a contractual basis and generally arise from the agreement of two or more parties to constitute and regulate a legal relationship with patrimonial content. The partnership/company agreement falls in the category of the associative contracts: the performance of each party (in this event the contribution) may be of different form and amount; it is a potentially plurilateral and open contract; it is a contract for the organisation of a future activity.

To the different kind of partnerships and companies will apply different rules, but all have some common characteristic (with some exceptions for each one) which are set out in the definition contained in art. 2247 c.c.

1. The joint operation of a business activity.
   This is the object of the company agreement and the specific activity that the partners propose to carry out is defined corporate object.
   This activity is predetermined in the articles of incorporation and can only be amended in accordance with the rules governing amendments to the articles of incorporation.
   Then, the activity carried out must be a productive activity, i.e. an activity with a patrimonial content, conducted with an economic method and aimed at the production or exchange of goods and services, hence the activity must be a business activity.
   With regard to this characteristic, it must be also said that the form of the simple partnership can be used only to the joint exercise of non-commercial enterprises (that is, agricultural enterprises). The others form of partnerships and companies can be used both for agricultural and commercial activities.
2. In all of them the members obligate themselves to grant a contribution.
   Contributions are the performance that members obligate themselves to make, in order to join the partnership/company and may be allocated in the form of cash, goods and services.
   Broadly speaking, contributions must be economically estimable.
   But this rule is fully applicable only to the partnership. For companies there are specific rules in order to the type of contribution which members can do and for its evaluation.
   Contributions are the risk capital of the partnerships and companies, and they go to form the partnership/company's capital.
   The capital is a number that expresses the value of the total contributions in cash and remains the same throughout the course of the partnership/company. To modify this number is

necessary a decision of the members of the partnership/company, because the evaluation of the contributions expressed in the capital is contained in the instrument of incorporation.
The capital has two important functions:

a. indicates the value that the partners have agreed to bind in the business activity, and which cannot be divided among them, and is an asset guarantee for creditors;
b. has an organizing function because it is used to determine whether there are profits or losses; also, is based on the amount of the contribution made by each person the extent of the rights to which they are entitled is determined (e.g., if a shareholder has contributed 1,000 euros corresponding to 10% of the capital, he/she will have 10% of the voting rights and will be entitled to receive the 10% of the profits).

Capital must be kept separate from the assets of the partnership/company, which consist of all the entities' activities and liabilities.

The most important difference between partnerships and companies is that: only companies have the legal personality.
Legal personality generally means that the legal entity (company) is different from its members: it has a separate legal existence, and it is distinct from its member. It follows that the legal entity's assets are completely segregated from those of its members: the company's creditors cannot seek satisfaction of their claims on the assets of the company's member, as they can rely on the company's assets only.
On the other hand, in partnerships their members (all or some) have an unlimited, joint and several liability for partnership debts. Hence, the assets and the liabilities of the partnership are only partially segregated from the assets and the liabilities of their members. Partial segregation means that partnerships' creditors cannot satisfy their claims on the on the individual partners' asset before having first tried to satisfy the on the partnership's assets: only in the event the partnership's asset were not enough to pay the partnership's creditors, the partners will be held personally liable for the non-fulfilled partnership obligations.

The partnerships. Introduction.

Simple partnership is a type of partnership which can only exercise non-commercial activity, and the rules provided for it will apply where it does not appear that the parties intended to form the partnership according to one of the other types (default type of partnership).
The general partnership is a type of partnership that can be used both for the exercise of commercial activity and for the exercise of non-commercial activity, and it is in any case subject to registration in the Business register with the effects of legal publicity.
In the simple and general partnerships all partners are jointly and severally liable without limitation for partnership obligations.
The limited partnership is characterized with respect to the other partnerships by the presence of two categories of partners: a) the general partners, who are jointly and severally liable without limitation for the partnership's obligations and b) the limited partners, who are liable limited to the quota conferred. It is a type of partnership that must in each case be specifically chosen by the parties.
The rules provided for the simple partnership are in principle also applicable to the general partnership and to the limited partnership.

Simple partnership and general partnership.

1. Incorporation.

The simple partnership agreement is not subject to specific form, except for those form required by the nature of the assets contributed (contributions) (art. 2251 c.c.). Also, there are not rules that provide for the content of the simple partnership agreement.
For this type of partnership is also required the subscription in the Business register (in a special section), with the effect of legal publicity.
The incorporation of the simple partnership is governed by a higher simplicity in form and substance. The partnership agreement may also be concluded orally or may result from concluding conduct. Any absence regarding some aspects of the partnership agreement, even essential aspects (such as contributions), is covered by the law, with suppletive rules.
For the incorporation of general partnerships are provided rules concerning the form and the content of the partnership agreement (instrument of incorporation). These rules are stated for the sole purpose of partnership registration in the Business register. The registration is a condition for the regularity of the general partnership, but it is not a condition for its existence or for its validity.
Indeed, the lack of the inscription in the Business register is only relevant to the applicable regulation. That is, it implies that the relationships between the partnership and third parties will be governed by the discipline (less favourable for partners) of simple partnership.
From this arises the distinction between the so-called "regular general partnership" and "irregular general partnership". It's "regular" the general partnership which is inscribed in the Business register, that is fully governed by the rules provided for the general partnerships. It's "irregular" the general partnership which is not inscribed in the Business register, and the rules applicable is that of the irregular general partnership (art. 2297, par. 1, c.c.: until the general partnership is registered in the Business register, the relations between the partnership and third parties, without prejudice to the unlimited and joint and several liability of all partners, shall be regulated by the provisions relating to the simple partnership).
Only for the purpose of the registration in the Business register (and so for the regularity of the general partnership) the instrument of incorporation must be drawn up with the form of the public deed or of

a written private deed certified by the notary (art. 2296, par. 1, c.c.). Also, the instrument of incorporation must contain the following information (art. 2295 c.c.):
1) the partners last name and first name, their domicile, their citizenship;
2) the name of the partnership;
3) the partners who have the power to manage and the power to represent the partnership;
4) the headquarters of the partnership and any branch offices;
5) the corporate object;
6) the contributions of each partner, the value attributed to them and the method of valuation;
7) the services to which the working partners are obliged;
8) the rules according to which profits have to be distributed and the share of each partner in profits and losses;
9) the duration of the partnership.

To registration not all this information is essential: in particular, those referred to in the numbers 3 and 8. Their lack will be supplied with some rules that will be explain later.
The freedom of form for the incorporation of the partnerships finds a limit when a special form is required by the law for the nature of the assets contributed (for example, written form is required under penalty of invalidity for real property). However, the written form is required only for the validity of the contribution, not for the validity of the partnership agreement. So, in the lack of the written form it will be null and void only the participation of the partner who has invalidly conferred his/her contribution.

2. Contributions.

With the partnership incorporation each partner assumes the obligation to make the contributions determined in the partnership agreement.
As said, the determination of the contribution of the partners in the instrument of incorporation is not necessary to have a valid incorporation of the partnership. If nothing is provided in this regard in the instrument of incorporation, the law states that «if the contributions are not determined, it is presumed that the partners are obliged to contribute, in equal parts among themselves, what is necessary for the achievement of the corporate object» (art. 2253, par. 2, c.c.).
Unlike companies, no restriction is provided for the assets which can be conferred as contribution. So, in partnerships can be conferred any assets (cash, goods or services) that can be economically valuable and that is useful for the achievement of the partnership purpose.
The Italian Civil Code provides some specific rules for some kind of contributions: contribution of assets in kind, contributions of receivables, contributions of work. But this regulation for the most part refer to other rules (regulations on sale, on lease…).
Contribution goes to form the initial asset (patrimonio) of the partnership (at this stage the asset corresponds to the capital). The latter become the owner of the assets conferred by the members as contributions. So, partners cannot use the goods that are in the partnership asset (initial contribution and assets purchased by the partnership) for purpose different from the corporate object (art. 2256 c.c.). The violation of this prohibition may result in compensation for damages and exclusion of the partner from the partnership. Also, this prohibition can be derogated with the consent of all the other partners.
A regulation of the partnership asset lack in the Civil Code for the simple partnership.
For the general partnership, instead, there is few rules. The law states that the instrument of incorporation indicate the contributions made by the partners, the value attributed to them and the method of valuation: that allow the determination of the amount of the partnership nominal capital. But nothing it's provided for the valuation of the assets other than cash, so this valuation is completely deferred to the partners.

Then, there are only two rules provided to grant the integrity of the partnership capital.
Article 2303 of the Civil Code forbids the distribution among the partners of profit that were not really achieved: amounts that do not correspond to a surplus of net asset (patrimonio netto) over the nominal capital. The same rule states also that if there is a loss in the partnership capital, no distribution of profits may take place until the capital is replaced or reduced accordingly.
Article 2306 forbids to directors to reimburse to the partners the contributions already done or to release partners from the contributions they still have to make in the absence of a resolution to reduce the share capital, passed according to the rules provided for the amendments of the instrument of incorporation and subject to the recording in the Business register. This operation involves a real reduction of the net asset and could undermine the interests of the partnership's creditors. So, they have the right to claim against the reduction resolution (the court could state that the reduction can however be done if an appropriate guarantee is given by the partnership in respect of creditors who claimed).

3. Partners' participation in profits and losses.

All the members have the right to participate in profits and losses of the partnership. They are free to determine each partner's due portion and is not necessary that the division is made proportionally to the contributions.
The only limit provided by the law is the ban of the leonine pact. Indeed, it is null and void the pact by which one or more partners are completely excluded from all participation in profits or losses (art. 2265 c.c.). Also, must considered null and void any criteria of division in profits and losses that are drafted in a way that determine the exclusion from all participation in profits or losses.
Null and void is, in general, only the leonine pact, with the consequence that it has to be applied the legal criteria provided for the participation in profits and losses in the event that the instrument of incorporation nothing state to this regard.
These legal criteria are the following:

1) Partners' participation in gains and losses are presumed to be proportional to contributions.
2) If the value of the contributions is not determined in the instrument of incorporation, they shall be presumed equal.
3) If it is determined only the participation in the gains, it is presumed that in the same way must be determined the participation in the losses, and vice versa.
4) The participation due to the working partner, if is not determined in the partnership agreement, shall be determined by the court according to fairness (equità).

In the simple partnership the right of the partners to get their profits arise with the approval of the financial statements, which is drawn up by the managing partners (directors) at the end of each year, unless otherwise provided in the partnership agreement.
In the general partnership the document that states profits and losses it's a real financial statement, drawing up following the rules provided for the financial statements of the companies limited by shares. The financial statement must be drawn up by the managing partners and it must be approved by the partners, with the majority determined according to the portion in the profits attributed to each of them.

4. Partners liability for partnership obligations (debts).

In simple partnership and in general partnership for the partnership obligations is liable, first and foremost, the partnership whit its assets; that is the primary guarantee for the partnership creditors. This is not the only guarantee, because for the partnership obligation are personally and unlimitedly liable also the partners.
The regulation is not the same for the two types of partnership.
In simple partnership, the personal liability of all the partners is not a mandatory principle. The liability of the partners who don't have the power to represent the partnership may be excluded or limited with an appropriate agreement. But this agreement can only be opposed to third parties if it is brought to the knowledge of third parties by suitable means; failing this, the limitation or the exclusion of the liability is not enforceable against those who did not have knowledge of it. However, cannot be excluded the liability of all the partners (art. 2267, par. 2, c.c.).
In general partnership, the personal liability of all the partners is mandatory. So, a contrary agreement hasn't any effect against third parties and cannot be opposed to them – but has effect between the partners (art. 2292, par. 2, c.c.).
In both partnerships the liability of the partners for the partnership obligation is extended also to the new partners. Indeed, who become a partner, entering in the partnership already incorporated, will be liable with other partners for the partnership obligations arise before to the acquisition of the partner status (art. 2269 c.c.).
Moreover, the dissolution of the relationship for the death, the withdrawal or the exclusion of the partner doesn't take over the personal liability of the partner for partnership obligations arise before one of these events occurs. The dissolution of the relationship also must be brought to the knowledge of third parties by suitable means. Failing to do this, the dissolution of the relationship cannot be opposed to third parties who ignored it. This rule is applicable to simple partnership and to irregular general partnership.
In the regular general partnership, the opposition of the dissolution of a relationship it's governed by the legal publicity regime for the amendments of the instrument of incorporation: when the recording (in the Business register) of the cause of the relationship dissolution between the partner and the partnership is done, the ceasing of the personal liability is opposable to all third parties (also if they ignored it).

5. Partnership liability and partner liability.

In simple partnership and in general partnership the partnership creditors can satisfy on more than one asset: the partnership asset and the partners asset who are personal and unlimited liable.
But the partnership liability and the partners liability are not in the same floor. Here we can see an aspect of the partial asset autonomy of partnerships.
Partners are jointly and severally liable among them, but they are liable subsidiary to the partnership, because to them is granted the benefit of prior enforcement (the so called beneficium excussionis) of partnership assets. Creditors must first try to satisfy on the partnership assets before to satisfy their claim on the partners asset.
This benefit of prior enforcement of partnership assets works into different ways, depending on the type of partnership.
In the simple partnership (and also in the irregular general partnership), partnership creditors can claim for his/her credit directly to the illimited liable partners and is the latter who have to invoke the prior enforcement of partnership assets, indicating the assets on which the creditor can easily satisfy himself/herself. Here, the prior enforcement of partnership assets works by way of exception and the partner will have to pay if he/she doesn't prove that in the partnership asset there are sufficient assets, easy to liquidate by the partnership creditor.

In the regular general partnership, instead, the prior enforcement of partnership assets is more intense; it works automatically. Partnership creditors cannot claim the payment directly to the single partners. Before, they have to execute the partnership assets. In this regard, it's not enough to ask for the payment to the partnership or that the creditor has a decision of a court, is required to have unsuccessfully pursued an enforcement action (azione esecutiva). Only after done this, partnership creditor can ask the payment of his/her credit to partners.

6. Partner's personal creditors.

The partnership asset is not liable for the personal obligations of the partners, and personal creditors of the partners can not satisfy on the partnership assets. Hence, partner's personal creditors can never directly "attack" the assets of the partnership.
But to partner's personal creditor is granted a form of protection. Both in the simple and in the general partnership he/she may: 1) assert his/her rights to the profits due to the partner/debtor and 2) perform conservative acts on the quota due to the partner in the liquidation (art. 2270, par. 1, c.c.).
In the simple partnership (and in the irregular general partnership too) the partner's personal creditor can also ask for the liquidation of the quota of his/her debtor; but he/she must prove that the other assets of the partner/debtor are not sufficient to satisfy his/her credits (art. 2270, par. 2 and 2297 c.c.). It means that also in this event the partner's personal creditor cannot satisfy on the partnership assets directly. Indeed, the partnership must only to pay to the partner's personal creditor, within three months, an amount in cash corresponding to the value of the quota of the partner (art. 2289 c.c.).
To the regular general partnership, the law provides with a different rule: a partner's personal creditor, as long as the partnership lasts, cannot ask for the liquidation of the quota of the debtor/partner (art. 2305 c.c.), also if he/she can give the proof that the other assets of the partner/debtor are not sufficient to satisfy his/her credits.
This rule applies until the deadline of the general partnership stated in the instrument of incorporation. Partners can pass a resolution to approve the extension of the duration, but in this event partner's personal creditors have the right to oppose this resolution, and if the opposition is accepted, the partnership must, within three months by the decision, liquidate the quota of the debtor/partner. In case of tacit extension (partners in this case don't pass a resolution but continue the business activity) the personal creditor may ask the liquidation of the quota of his/her debtor in accordance with article 2270 c.c.

7. The administration of partnership.

The administration of the partnership is the activity aimed to manage the partnership. The power to manage is the power to carry out all acts within the partnership purpose.
Under Italian Company Law each unlimited liable partner is director of the partnership (art. 2257 c.c.). The instrument of incorporation may provide that the power of administration is reserved only to some partners, arising the distinction between managing partners and non-managing partners.
When the power of administration is exercised by more partners (all or some partners) and the partnership agreement doesn't provide anything in relation to the administration, it applies the legal model of the disjunctive administration (or several administration, art. 2257 c.c.). Hence, each managing partner can fulfil all the operations within the partnership purpose, and he/she isn't obliged to ask the consent or the opinion of other managing partners, nor to inform them before to fulfil the operations.
This wide individual power is tempered by the right of opposition that is granted to each other managing partner. The opposition must be exercised before the fulfilment of the operation and,

whether it is timely, paralyze the individual power of the managing partner relating to that operation (it's a so-called "veto right").
On the opposition will decide all the partner (both managing partners and non-managing partners). The decision is passed with the majority determined according to each partner's portion on the profits. Disjunctive administration offers some benefits in terms of speed of the decision, but also it could be dangerous because the single managing partner could fulfil operation that can undermine the interest of the partnership without the knowledge of others.
Hence, the law also provides for another model of administration, which is aimed to privilege the exigence of a best ponderation: the conjunctive administration (or jointly administration, art. 2258 c.c.).
The conjunctive administration must be expressly chosen in the instrument of incorporation or with an amendment to it because the default rule is the disjunctive administration. With the conjunctive administration is necessary the consent of all managing partners to fulfil the operations. With the instrument of incorporation can be also provided that the operation must be approved by the managing partners with the majority determined according to each partner's portion on the profits. So, the conjunctive administration can be designed both providing for unanimous administration and majority administration, or even by providing that unanimity is required for the fulfilment of some operations while the majority is sufficient for others.
The higher rigidity of the conjunctive administration is temperate with the rules that gives to all the managing partners the power to act individually when there is an urgency to avoid a damage to the partnership.
Also, must keep in mind that disjunctive and conjunctive administration can be combined, by providing for the application of disjunctive administration for some operations and conjunctive administration for others (with the consent of all the managing partners or/and with the majority).

8. Administration and representation.

Among the responsibilities provided by the law for the managing partners there is also the power to represent the partnership.
The power of representation is the power to act with third parties on behalf of the partnership, acquiring right and assuming obligations for the partnership (art. 2266, par. 1, c.c.).
So, the power of representation is different from the power to manage, the latter is the power to decide the fulfilment the partnership operations. The power of manage involve the internal management activity, the decision-making process of the partnership operations. The power of representation, instead, involve the external management activity, that is the stage of implementation with third parties of the partnership operations.
Unless otherwise provided in the instrument of incorporation, the power to represent the partnership is attributed to each managing partner, disjunctively or conjunctively, depending on the administration model adopted by the partnership. Hence, in the case of disjunctive administration, each managing partner can decide alone and alone stipulate acts in the name of the partnership (several signature power). Instead, in the case of conjunctive management, the decision will be taken with the consent of all the managing partners or with the majority, and all managing partners must participate in the stipulation of the act (joint signature power).
Moreover, under the legal model, both the power of management and the power of representation are extended to all the operation within the partnership purpose, without any distinction between ordinary or extraordinary act. Also, the power of representation covers the procedural representation.
The instrument of incorporation can provide a different regulation of the power of management and of the power of representation. It can, for example, attribute the power of representation only to some managing partners. Also, it may establish ways of exercise for representation that differ from those that apply to the power of management (e.g., several signature may be established for certain acts

even if the administration is conjunctive). Finally, the instrument of incorporation may limit the extent of the individual managing partners' power of representation. May, for example, provide for several signatures for acts not exceeding a given amount or for acts of ordinary administration and joint signatures for acts exceeding a given amount or exceeding ordinary administration.
The provision of conventional limitations on managing partners' power of representation raises the issue of their enforceability against third parties.
This issue, in the regular general partnership is solved with the legal publicity. The limitations on managing partners' power of representation, both original (provided with the instrument of incorporation) and subsequent (provided whit an amendment of the instrument of incorporation or with a separate act), are not opposable against third parties if they are not recorded in the Business register or if it is not proved that third parties had actual knowledge of them (2298, par. 1, c.c.).
In the irregular general partnership, the lack of registration turns against partners and third-parties reliance is protected. Indeed, it is presumed that each partner who act on behalf the partnership has the power to represent the partnership. Limitations to the power of representation cannot be opposed to third parties, unless it can be proved that they were aware of it (art. 2297, par. 2, c.c.)
In simple partnership the situation is different and more complex. Under the rules provided by the Civil Code, original limitations to the power of representation are always opposable to third parties and are the latter who must check if the partners who act on behalf of the partnership have effectively the power to represent the partnership. Hence, the limitations or the termination of the power of representation must be disclosed to third parties by suitable means; failing to do so these limitations or the termination is opposable to third parties only proving that they were aware of it (art. 2266 c.c.).
However, with the introduction of the legal publicity regime for the simple partnership, the same regime as for the regular general partnership can be considered to apply.

9. Managing-partners.

The rule under that each unlimited liable partner is a director of the partnership has a dispositive character (it means that it can be derogated). The instrument of incorporation can attribute the administration to some partners, giving rise to the distinction between managing partners and non-managing partners.
In this event, partners who will have the power to manage the partnership can be appointed directly in the instrument of incorporation or with a separate act. The law doesn't specify if the appointment with a separate act must be passed with the consent of all the partners or if it's enough the majority based on the participation to profits. The latter is the most preferable solution anyway.
The distinction between managing partners appointed in the instrument of incorporation and managing partners appointed with a separate act is relevant for the removal of the power of management.
The removal of the managing partner appointed in the instrument of incorporation involves an amendment to the latter; so, it must be decided by the other partners with the consent of all of them, unless otherwise provided (art. 2252 c.c.). Moreover, the removal has no effect if there are not a just cause (art. 2259, par. 2, c.c.).
Managing partners appointed with a separate act, instead, can be removed from their office following the rules provided for the agency (mandato). Hence, he/she can be removed also without a just cause, except for the right to compensation for damages. It is controversial if it is required a decision taken by all the other partners or if it is enough the majority (the latter is the most preferable solution).
However, the removal with just cause can also be stated by the Court upon a request of each partner (art. 2259, par. 3, c.c.).
With regard of powers and duties of the managing partners, the Civil Code states that these are governed by the agency rules (art. 2260 c.c.). It must be said, however, that powers and duties of

managing partners are, by several points of view, different and wider than powers and duties of an agent.
Indeed, to the director is attributed by the law the power to fulfil all the operations within the partnership purpose. To him/her doesn't apply the limit of the ordinary management act that is, instead, provide for the agent. From the powers of directors remain excluded only acts involving a change in the corporate object. For example, directors cannot radically change the type of activity provided in the partnership agreement.
Then, several and specific duties are provided for the directors. In particular, in the general partnership they have to keep the accounting records (scritture contabili) and drawn up the financial statements (art. 2302 c.c.); they also must fulfil the requirements associated with registration in the Business register (art. 2621-2641 c.c.).
Of the obligations imposed by law or the instrument of incorporation, which can be summarized as the general duty to carefully manage the partnership, the directors are jointly and severally liable towards the partnership, with the consequent obligation to compensate the partnership for the damages caused to it. However, liability does not extend to directors who prove that they are free from fault (art. 2260, par. 2, c.c.).
Pursuant to the discipline of agency, managing partners are entitled to receive compensation for their office.

10. Non-managing partners.

When the power to manage the partnership is attributed only to some partners, the law grants other partners deep powers of information and control (art. 2261 c.c.)
Each non-managing partners, indeed, has the following powers:

a) The right to have information from the directors about the running of the partnership's operations.
b) The right to consult the documents relating to the administration of the partnership and all the accounting records.
c) The right to obtain a financial statement at the end of each year, or at the end of the partnership's running if this one end first.

11. Partners non-competition duties.

Only in the general partnership all the partners (managing and non-manging) may not carry on for their own account or for the account of others a business competing with that of the partnership and may not be unlimited partners of a competing partnership (art. 2301 c.c.).
The violation of this prohibition implies the compensation for damages to the partnership and entitles the other partners to decide on his/her exclusion.
However, the prohibition is not absolute. It can be removed by the other partners and the consent is presumed if the competitive situation existed before the incorporation of the partnership and the other partners were aware of it (art. 2301, par. 2, c.c.).

12. The amendments to the instrument of incorporation.

In simple partnership and general partnership, the instrument of incorporation can be amended only with the consent of all the partners, unless otherwise provide (art. 2252 c.c.). Hence, in the absence of a different provision, prevails the interest of each partner in preserving the organizational basis originally set forth in the partnership agreement. No agreement in the instrument of incorporation can

be changed without the consent of all partners (although some exceptions were introduced with the 2003 reform: transformation, merger and division).
Within the amendment of the instrument of incorporation also fall the changes in the composition of the partnership (i.e., the changing of partners). So, also in the event of the transfer of quota (whether by act between living persons or by cause of death) it will be necessary the consent of all the other partners.
The instrument of incorporation can provide for the free transferability of the quota and/or also the continuation of the relationship with the heirs of the death partner.
In regular general partnership and now also in simple partnership, the amendments of the instrument of incorporation are subjected to the recording in the Business register, and only after the recording they can be opposed to third parties. Before the recording they cannot be opposed, unless it can be proved that third parties were aware of it.
In irregular general partnership, the amendments of the instrument of incorporation must be brought to the knowledge of third parties by suitable means and cannot be opposed to those who have without fault ignored them.
Under article 2252 it is also possible that the instrument of incorporation provides in a different way for the decision concerning the amendments to it. Indeed, in the partnership agreement it is common to find a clause that provide for amendment of the instrument of incorporation by majority vote.
The power of the majority with regards the amendments of the instrument of incorporation meet some limits, because it must be compliant with two general principles: the obligation to execute the agreement with good faith and the respect for the equal treatment of partners. For example, the majority can pass a resolution to oblige the partners to do new contributes, but it cannot decide that only some partners are obliged to do so.

13. Dissolution of the relationship between partner and partnership.

Each one cease to be partners of a partnership for the death, the withdrawal, and the exclusion.
When one or more partners cease the relationship with the partnership this does not result in the dissolution of the partnership but requires only the necessity to define the patrimonial relationship between the actual partners and the outgoing partners or the heirs of the death partner throughout the liquidation of his/her quota. It's a decision of the actual partners if proceed then to the dissolution or to continue the partnership.
The principle of preservation of partnership operates even when only one partner remains. Indeed, the loss of the plurality of partners operates as a cause for dissolution only if the plurality is not reconstituted within six months (art. 2272, n. 4, c.c.).
Let's now explain each single cause of dissolution of the relationship between partner and partnership.

14. (follow). The death of the partner.

When a partner dies the remaining partners are by law obliged to liquidate the partner's quota to his/her heirs within six months (artt. 2284 and 2289 c.c.). Hence, the remaining partners are not forced to suffer the entry of the heirs of the deceased partner into partnership.
Alternatively, the remaining partners can decide:

a) The early dissolution of the partnership.
   In this event the heirs have no longer the right to the liquidation of the quota within six months. They have to wait the end of the liquidation procedure of the partnership, and they participate with the partners to the division of the partnership's assets after the payment of partnership creditors.
b) The continuation of the partnership with the heirs of the dead partner.

In this event it is necessary the consent of all the remaining partners and the consent of the heirs (also if the instrument of incorporation contains a clause of continuation of the relationship with the heirs). The consent of remaining partners is not necessary if the instrument of incorporation contains a clause of continuation of the partnership with the heirs of the dead partners.

15. (follow). The partner withdrawal.

The withdrawal is the dissolution of the relationship with the partnership by the will of the partner (art. 2285 c.c.).
When the partnership is contracted for an indefinite period or for a period which exceed the lifetime of the partners, each partner can freely withdraw from the partnership. The withdrawal must be communicated to the other partners with at least three months' notice and take effect only after this period of three months has expired.
When the partnership is contracted for a definitive period, the withdrawal of the partner is admitted only if a just cause occurs. In this case the will to withdraw must be communicated to the other partners too, but the withdrawal is immediately effective.
The partnership agreement can provide other grounds for withdrawal, specifying the rules to exercise them. The instrument of incorporation cannot delete the grounds of withdrawal provided by the law.

16. (follow). The partner's exclusion.

The last cause of dissolution of the relationship between partner and partnership is the exclusion of the partner from the partnership. It can be distinguished into two hypotheses: in some cases, it follows automatically to some situations (exclusion by law), in other cases it is optional, i.e., it can be decided by the other partners when some events occur (optional exclusion).
Is exclude by law (art. 2288 c.c.):

a) A partner against whom judicial liquidation proceedings have been opened or extended pursuant to the Insolvency Code.
b) A partner against whom one of his/her personal creditors has obtained the liquidation of the quota under art. 2270 c.c.

In the first case, the exclusion take effect from the day of the decision that states the opening of the procedure. In the second case, instead, the partner ceases to be a partner only when the liquidation of his/her quota is effectively done.
Facts that justify the decision of the partnership to exclude a partner are provided in article 2286 c.c. and can be grouped into three categories:

1) Causes relate to a serious breach of the obligations provided by the law or by the partnership agreement. For example, failure to execute promised contributions, violation of non-competition duties, obstructive behaviour.
2) Causes related to the loss of the legal capacity: a decision of interdiction, incapacitation, or a judgment to a penalty involving the disqualification from public office, even temporary. In these cases, the law considers the discredit that could come to the partnership and the participation of unwelcome third parties in the partnership administration.
3) Causes related to the contributions. The last group of optional exclusion causes includes the cases of supervening inability of the partner to execute the contribution for reasons not attributable to the directors. Hence: a partner who has obliged himself/herself by the contribution to transfer the ownership of a good may be excluded if this has perished before the property is acquired to the partnership; a partner who has contributed the use of a good to the partnership may be excluded for the loss of this good due to causes not attributable to the

directors; a partner who has contributed his/her labor to the partnership may be excluded for the supervening inability to do the work conferred.

Exclusion is decided by the majority of the partners (calculated by heads: each member has one vote), not counting the partner to be excluded (art. 2287, par. 1, c.c.). The decision must be motivated and must be communicated to the excluded partner.

It takes effect after thirty days from the date of notice to the excluded partner. Within this period the excluded partner can claim against this decision (opposition) before the Court, which can also suspend the execution of the decision.

This procedure, of course, cannot apply when the partnership is composed by only two partners. In this event, the exclusion of the partner is decided directly by the Court upon the request of the other partner (art. 2287, par. 3, c.c.).

17. (follow). The liquidation of the quota in case of dissolution of the relationship between partner and partnership.

When a cause of dissolution of the relationship between partner and partnership arise, partner or his/her heirs have the right to obtain the liquidation of the quota. More exactly, he/she has the right to obtain an amount of money which corresponding to the value of the quota (art. 2289, par. 1, c.c.).

It means that the partner cannot ask the restitution of the goods conferred to the partnership, also if they are already existent in the partnership asset. Nor a partner who has contributed the use of a good to the partnership can ask for its restitution, unless otherwise provided in the partnership agreement.

The value of the quota is determined taking into account the financial situation of the partnership in the day in which the dissolution of the relationship occurs. The financial situation of the partnership must be determined attributing to assets their actual value (and not the prudential value resulting from the annual financial statements), as well as taking into account the value of the partnership assets and of profits and losses from ongoing operations.

The payment of the quota attributed to the partner – if it results in a positive value – must be fulfil within six months, which run from the day in which the dissolution of the relationship occurs. In the case of dissolution relating to the require of the partner's personal creditor, must be fulfil within three months by the request.

As already seen, the ceased partner or the heir of the deceased partner continue to be personally liable for the partnership obligations arised until the day in which the dissolution occurs.

18. The dissolution of the partnership.

The grounds of dissolution provided for the simple partnership and general partnership are the following (art. 2272 c.c.):

1) The expiration of the term fixed in the instrument of incorporation.
   It is however possible the continuation of the partnership. The extension of the deadline can be both express (with a formal decision of the partners) or tacit. The partnership is deemed to be tacitly extended indefinitely when, after the expiration of the term, the partners continue the business activity.
2) The achievement of the corporate object or the supervening impossibility of achieving it. Causes that make impossible to achieve the corporate object also include obstacles to the operation of the partnership caused by the irreversible discord among the partners resulting in the absolute paralysis of the business activity.
3) The will (consent) of all partners, unless the instrument of incorporation provide that the early dissolution of the partnership can be decided by the majority.

4) The lack of the plurality of partners, if within six months this is not reconstituted. The fact that remains only one partner is not itself a cause of dissolution of the partnership. For this cause for dissolution to become operative, it is necessary that the situation continue for six months.
5) Other causes provided for in the partnership agreement.

5-*bis*) The opening of the controlled liquidation procedure.

When a cause of dissolution occurs, the partnership enters automatically in the liquidation status and in case of a general partnership this situation must expressly indicated in the act and in the correspondence (art. 2250 c.c.).
The partnership is not immediately extinguished. First, partnership creditors must be paid, and the remaining assets (if any) must be distributed among the partners through the liquidation procedure. Further activity must therefore aim only at the settlement of ongoing operations, and therefore the powers of the directors are by law limited to the fulfil of urgent business activity (art. 2274 c.c.).

19. The liquidation procedure and the extinction of the partnership.

The liquidation procedure starts with the appointment of one or more liquidators. This decision requires the consent of all the partners, unless otherwise provided in the instrument of incorporation. In case of disagreement among the partners, liquidators are appointed by the President of the Court (art. 2275, par. 1, c.c.).
Liquidators can be removed with the consent of all the partners and however by the Court if a just cause occurs, upon the request of one or more partners (art. 2275, par. 2, c.c.).
With the acceptance of the appointment, liquidators take the place of directors. The latter must hand over the partnership assets and documents and present a report on the management for the period following the last financial statements. Directors and liquidators must then draw up the inventory, which shows the assets and liabilities of the partnership (art. 2277 c.c.). Doing so, is fixed any liabilities of the directors for their management and their activity runs out.
Liquidators come into action, and their main role consist in the definition of all the operations relating to the business activity: conversion of assets into cash, payment of partnership creditors, distribution of any remaining assets among partners.
Liquidators may perform all the operations necessary for the liquidation and, if partners have not provided otherwise, they may also sell the partnership assets and make transactions and compromises. They also have legal and procedural representation of the partnership (art. 2278 c.c.).
In particular, to proceed with the payment of the partnership creditors, liquidators may ask to each partner the payment still due, but only if the available funds are insufficient. If it is necessary, they also can ask to the partners the further necessary sums within the limits of their respective liabilities and in proportion to the participation of each one in the losses (art. 2280, par. 2, c.c.).
The law provides two bans for the liquidators:

1) They cannot fulfil new operations. If they breach this provision they will be personally, jointly and severally liable for those operations toward third parties (art. 2279 c.c.).
2) They cannot distribute the partnership assets, even partially, among the partners, until the partnership creditors are paid or the sums necessary to pay them are set apart (art. 2280 c.c.).

Otherwise, liquidators' duties and liabilities are governed by the rules provided for directors (art. 2276 c.c.).
Once all the partnership debts are paid, the liquidation procedure go to the end with the distribution of any remaining assets converted in money among partners, if the latter haven't stated that the distribution shall be done through the handover of the assets in kind.

The remaining assets are attributed first to the reimbursement of the nominal value of the contributions. Any surplus shall be distributed among the partners in proportion to each one's participation in the profits (art. 2282 c.c.).
There is not any specific rule for the end of the liquidation procedure in the simple partnership.
In the general partnership, instead, liquidators must draw up the final financial statements and the distribution plan (art. 2311 c.c.). The first is substantially the report of the liquidator's management activity: it will expose the incomes and the expenses that occurred and the final financial situation. The second is a division proposal among the partners of the remaining asset. To the approval of these documents the law provides a particular mechanism: they are considered approved if they have not been opposed within two months of the communication by the partners.
With the approval of the financial statements, liquidators are free from their liability towards the partners and the liquidation procedure ends.
In the irregular general partnership, the end of the liquidation procedure determines the extinction of the partnership, whether the rules are met and so the partnership creditors have been paid. Failing this, the partnership must be considered already existent, also because lack a formal act that states its end.
Different principles governing the regular general partnerships, and the simple partnerships too, following the provision for a legal publicity regime. After the approval of the final financial statements, liquidators must ask for the cancellation of the partnership to the Business register office (art. 2312 c.c.).
With the cancellation by the Business register, the partnership is extinguished. That is both if the liquidators aren't aware of the existence of other partnerships debts and in the hypothesis in which they are aware of this situation too, breaching the ban to distribute the corporate assets until all the partnership creditors are paid (art. 2280 c.c.).
In the latter event, partnership creditors who have not receive the payment can claim against the partners, who remain personally liable for the partnership obligations. They also can claim against the liquidators, if the lack of payment is due to the fault of them (art. 2312, par. 2, c.c.).

Limited partnership

1. Definition and distinctive features.

Limited partnership is a partnership that can be distinguished to the general partnership for the presence of two categories of partners:

a) general partners, who are personally, jointly and severally liable for the corporate obligations,
b) limited partners who are liable limited to the quota conferred. More exactly, they are only obliged towards the partnership to fulfil the contributions promised.

Different is also the position of these two categories of partners in relation to the partnership administration. That is an exclusive responsibility of the general partners. Limited partners, instead, are excluded from the managing of the business activities.
The limited partnership regulation is designed on that of the general partnership (art. 2315 c.c.), of course with some adaptations required by the presence of two categories of partners, each one with different powers and different liabilities for partnership obligations.
The partnership is also very different from the limited partnership by shares: in the latter there is two categories of partners too, but that is a company (società di capitali), and its discipline is designed on the discipline of the company limited by shares.
The limited partnership is the only form of partnership that consent the common exercise of a business activity with a limitation of the risk. For this reason, it is a type of partnership that could easily be abused.
Hence the need to prevent abnormal use of this type of partnership, with the provision of strict limits on limited partners and serious penalties for their violation. This, as will be seen, is the reason for the rules provided for the formation of the partnership name and the prohibition of administration on limited partners.

2. Limited partnership incorporation. Partnership name.

To the incorporation of limited partnership applies the rules provided for the general partnership. The instrument of incorporation must indicate who are the limited partners and who are the general partners of course.
The instrument of incorporation of the limited partnership is subject to the inscription in the Business register too, but the failure to register only results in the partnership's irregularity, with the application of the discipline exposed later.
A difference between the general partnership and the limited partnership regards the partnership name (art. 2314 c.c.). The business name of the limited partnership must be composed with the name of at least one of the general partners and with the indication of the partnership type (s.a.s.). It cannot be comprised in the partnership business name the name of the limited partners. This is to prevent those who come into contact with the partnership from also mistakenly relying on the personal liability of such partners.
Penalty for the limited partner who breach this prohibition is very heavy. Indeed, the limited partner, who allows his/her name to be included in the partnership name, is liable towards third parties unlimitedly, jointly and severally with the general partners for partnership obligations (art. 2314, par. 2, c.c.).

It means that the limited partner loses the benefit of the limited liability, and that is for all the partnership obligations and towards all the partnership creditors. But he/she will not become a general partner and so he/she will not have the right to manage the partnership.
Of course, the arising of the unlimited liability of the limited partner presupposes that the inclusion of his/her name in the business name was done with his/her express or tacit consent (tolerance).

3. Limited partners and partnership administration.

The regulation of the limited partnership is designed on that of the general partnership, but there are significant differences relating to the administration.
The administration of limited partnerships can be fulfilled only by the general partners, who have the same powers and duties as the partners of the general partnership (art. 2318 c.c.). From the administration (management and representation) are excluded the limited partners and the boundaries of this exclusion (so-called prohibition of interference) are specified by the article 2320, par. 1, c.c.
This rule states that limited partners may not fulfil acts of administration or transact or conclude business in the name of the partnership, except by virtue of a special attorney for some individual business (procura speciale per singoli affari). The limited partner is precluded both the participation to the partnership internal administration and the possibility to act on behalf of the partnership whit third parties (power of representation).
More exactly, relating to the internal administration of the partnership, the limited partner is lacking in any autonomous decision-making power for the business activity: he/she cannot decide alone any operation and he/she cannot participate to the decisions of the managing partners or condition their actions too.
The content of the exclusion of the prohibition of interference is less strict relating to the external activity. The limited partners, indeed, can transact or conclude business in the name of the partnership under a special power of attorney only for some given business. So, it is necessary that the business which to the limited partner is given the power to represent the partnership are determined and specific. To the limited partners is forbidden act on behalf of the partnership like a general agent.
Limited partner who breaches the prohibition of interference will be liable towards third parties unlimitedly, jointly and severally for all the partnership obligations (present, past and future).
Limited partner who breaches the prohibition of interference will be also exposed to the penalty of the exclusion from the partnership, with a decision taken by the majority of the other partners (general and limited partners). The exclusion cannot be decided when the act fulfilled in violation of the prohibition of interference has been authorized or confirmed by the directors.
To the limited partners, however, are attributed by the law, or can be attributed with the partnership agreement, some rights and powers of an administrative nature (in a broad sense).
First, limited partners have the right to contribute with the general partners to the appointment and the removal of the managing partners when the instrument of incorporation provide for their appointment with a separate act. Indeed, in this event it is necessary the consent of all the general partners and the consent of the limited partners who represent the majority of the capital subscribed by them (art. 2319 c.c.).
Regarding the participation in the business activities, the general prohibition of interference in the administration of the partnership is partially tempered by the legislative recognition that limited partners:

a) may transact or conclude business in the name of the partnership, but only under a special power of attorney for some given business;
b) may perform their work (manual or intellectual) in the partnership, under the direction of the managing partners and thus never in an autonomous or in an independent position;

c) may, if the instrument of incorporation so provides, give authorizations and opinions for certain operations, as well as carry out acts of inspection and control, always within the limits imposed by the general prohibition of interference in the administration.

With specific regard to the powers of control of the limited partners, they have anyway the right to have the annual communication of the financial statements and to control its accuracy, consulting the books and the other document of the partnership (art. 2320, par. 3, c.c.). It is common opinion that they contribute to the approval of the financial statements too, without this implies a violation of the prohibition of interference.
Because they are excluded from the administration of the partnership, limited partners shall not be required to return any fictitious profits collected, if they are in good faith and the profits result from duly approved financial statements (art. 2321 c.c.).

4. The transfer of quotas.

The different position of the general partners and of the limited partners is reflected in the rules provided for the transfer of their quota.
Regarding the transfer of the general partners quota, it applies the rules provided for the general partnership. Unless otherwise provided in the instrument of incorporation, the transfer of the general partners quota, whether by act between living persons or by cause of death, requires the consent of all the other partners (both general and limited partners). For the transfer due the cause of death, it will be necessary the consent of the heirs too.
Different is the rule provided for the transfer of the limited partners quota (art. 2322 c.c.). Their quota is freely transferable due cause of death, hence, without the consent of the remaining partners.
Regarding the transfer between living persons, instead, it's required the consent of the partners (both general and limited partners) who represent the majority of the partnership capital, unless otherwise is provided in the instrument of incorporation. The relevance of the consent of the other partners is so mitigated (because is provided the majority and not the unanimity) with respect to the transfer of the limited partners quota.

5. The dissolution of the partnership.

The presence of two categories of partners, which characterized the limited partnership, must remain throughout the duration of the partnership. Indeed, this type of partnership dissolve, in addition to the causes provided for the general partnership, when only limited partners or general partners remain, unless within the period of six months the ceased category has been replaced (art. 2323 c.c.).
Moreover, if all the general partners are ceased, the limited partners shall appoint a temporary director. His/her powers are by law limited to the carrying out of ordinary administration acts. The temporary director does not assume the status of a general partner; hence he/she are not unlimited liable for the partnership obligations.
To the liquidation procedure and the extinction of the limited partnership will apply the rules provided for the general partnership. However, once the limited partnership has been cancelled from the Business register, partnership creditors who are not been paid can claim for his/her credit against the limited partners only to the extent of what they received as liquidation quota, since they are not partners with unlimited liability (art. 2324 c.c.)

6. The irregular limited partnership.

The limited partnership is irregular when its instrument of incorporation has not been inscribed in the Business register.
Like the general partnership, the lack of the registration doesn't involve the incorporation of the partnership. Moreover, the distinction between limited partners and general partners remains in place. Indeed, also in the irregular limited partnership the limited partners remain liable limited to the quota conferred, unless they participated in the running of the business activities (art. 2317, par. 2, c.c.). In the case of an irregular limited partnership, therefore, not even the issuance of a special power of attorney exempts the limited partner from unlimited liability towards third parties for all the partnership obligations.
Otherwise, to the irregular limited partnership will apply the same rules provided for the irregular general partnership.