

LESSON 4: PARTNERSHIPS

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1.- General partnerships

a) The role of the general partnership in current trade

“Sociedad colectiva” is the type of company less used in current trade, because partners don't have limited liability. This fact makes the company less useful for the needs of modern trade. Nevertheless its study is important because the regulation of the general partnership is applied to those companies which are in a situation of irregularity, that is, those companies which are carrying out a commercial activity without being registered in the Trade Register.

The general partnership is regulated in the articles 125 to 144 of the Cco.

b) Concept

The general partnership can be defined as follows:

- It is the main type of partnership
- It works under a legal name which is composed of the name of all partners or just the name of some of them adding the ending “y compañía” or “cia”.
- It performs a commercial activity in which all partners participate. This type of company can be considered a kind of working community where all partners take part of the business management.

- The company has also its own assets. With these assets the company's debts should be satisfied, but if they are not enough all partners must contribute to the debts with their own money and properties. All partners have a personal, subsidiary, unlimited and a joint and several liability for company debts.

c) Formation

The Cco sets that all business companies must be formed granting a public deed of incorporation before a public notary and submitting the public deed to the Trade Register for its registration.

Public deed must include the following mentions (arts. 125 Cco and 209 RRM):

- Each partner's identity
- Company name
- Each partner contribution and the content.
- The amount of money which owns the company after having added all partners' contributions.
- Name and address of those partners who are in charge of the management of the company and can use the company name.
- Company duration
- The amount of money which partners who also administrate the company annually receive for their personal expenses.

All these mentions are compulsory but the partners may agree to include other ones provided they are according to law.

d) Company name (RAZÓN SOCIAL)

The Cco has been really strict when regulating the way in which a general partnership must form its company name. The company name must be composed of the name of all partners or just the name of some of them with the ending "y compañía" or "cia".

This is an imperative rule. Commercial Code doesn't allow to include in the company name the name of a person who is not a partner. In case it is included, that person will be jointly liable for company debts without having the legal consideration of partner and, therefore, without any kind of right (art. 162 Cco).

e) Types or partners

Depending on each one's contribution, it is possible to distinguish different types of partners in a general partnership:

- **Capitalist partner.** A partner who contributes money or property to the capital of the company
- **Industrial partner.** A partner who contributes services instead of money or property.

Both are general partners but there are some special rules for industrial partners.

f) Partners' obligations

1. Obligation to contribute to the company:

As we have exposed, partners can contribute money, property or services. This obligation exists as long as the company goes on operating in trade and its breach may cause the exclusion of the partner.

2.- Obligation not to compete with the company.

The content of this obligation is different depending on the type of general partner:

Industrial partners must not perform any kind of commercial activity for their own account unless the company has allowed them to do so. Industrial partners, therefore, must work exclusively for the company unless expressly authorized (art. 138 Cco).

In case of capitalist partners, the obligation will have different content depending on the way in which the company purpose has been defined in the public deed.

- If the company has an undetermined purpose, capitalist partners need company assent in order to be able to do business outside the company. In case a capitalist partner develops commercial activities without permission, all the benefits which may arise from them will be for the company. If there may be any losses, they would be supported by the partner (art. 136 Cco).
- When the company has a determined purpose, all capitalist partners may do business if the activity is different from the purpose of the company and there is no company agreement forbidding such behaviour (art. 137 Cco).

3- Obligation to bear losses

As a general rule, industrial partners don't participate in company losses although it is possible to agree something different in the company operating agreement. Capitalist partners will participate in company losses in the same proportion as in benefits.

g) Partners' rights

1- Right to participate in the management of the company

According to law, all partners have the right to participate in the management of the company. If all partners are going to be in charge of this activity, it must be noted that nothing can be agreed without the assent of all partners (art. 129 Cco).

Anyway, the company operating agreement tends to include clauses which limit the number of people who is going to be in charge of the management. There are different alternatives:

- It is possible to confer the management to one partner or several partners that can develop the activity assuming a joint or a joint and several liability.
- It is also possible to confer the management to a third person who doesn't participate in the company. It may be just because the company operating agreement expressly allows it or just because the partner or partners who are in charge of the management have delegated their functions with the consent of the rest of the partners.

2-Right to vote:

In this type of company unanimous decisions must be made. This unanimity refers to all present partners for those agreements which are not going to change the company operating agreement, whereas unanimity will refer to all partners if the agreements may change the company operating agreement.

3- Economic rights:

Partners have two economic rights; the right to participate in benefits and the right to obtain the liquidating dividend. Each partner will participate in benefits and will receive the liquidating dividends in the way the company operating agreement specifies. If the company operating agreement doesn't say anything in this regard, each partner will receive benefits according to his/her contribution to the company, and the industrial partner will receive them in the same proportion as the lower contribution partner.

h) Relationships with third parties

Those partners who the company operating agreement allows to use the company name are the only ones who can act on behalf of the company. It means that a company becomes liable to third parties when it has assumed an obligation under the company name used by a person allowed to do so (art. 128 Cco).

Those partners who are not allowed to use the company name can't make the company responsible to third parties.

A different situation is the misuse of the company name. That means the use of it by an allowed person but only to satisfy a personal interest. In this case, the company becomes liable to the third party but if a benefit arises from the activity carried out to satisfy a personal interest, the benefit will be for the company. On the other side, if there are losses, the person who has misused the company name will have to indemnify the company for damages.

4.2.- Limited partnerships

a) Concept and type of partners

The limited partnership can be defined as follows:

- It is a type of partnership which develops a commercial activity
- In this company two different types of partners coexist: the general partner who has an unlimited liability for company debts, and the limited liability partner whose liability is limited to his/her contribution to the company.

The limited partnership is regulated in the articles 145 to 150 of the Cco.

b) Formation and company name

Public deed must include the same mentions than the public deed of a general partnership with some additions:

- It also has to include the identity of each limited liability partner
- The contributions of each limited liability partner
- And the way in which decisions must be made.

The company name is formed in the same way as in the general partnership but with some peculiarities. It will include the name of all general partners or just the name of some of them with the ending "y compañía" followed in both cases by the abbreviation "sociedad en comandita".

The name of a limited liability partner can never be included in the company name, and if this rule is contravened, the limited liability partner whose name has been included will have an unlimited liability for company debts without becoming a general partner (arts. 146 Cco and 403 RRM).

c) Internal relationships

The peculiarities to be mentioned in this field are referred to limited liability partners

This kind of partners and their contribution to the company must be mentioned in the public deed, so that it could be possible to know the limit of their participation in benefits and their liability for company debts.

This kind of partners is not allowed to manage the company. If this rule is not observed, the company can demand damages and even expel the defaulting partner.

Distribution of benefits and liquidation dividend follow the same rules as for the general partner.

The public deed must mention the way in which the right to be informed about company management is granted to the limited liability partners

d) Relationships with third parties

General partners are the only ones who can act for the company. The use of the company name by the limited liability partners is forbidden.

3.-Cuentas en participación

Art. 239 of Commercial Code (Cdc) defines this kind of contract as follows: *“podrán los comerciantes interesarse los unos en las operaciones de los otros, contribuyendo para ello con la parte del capital que convinieren y haciéndose partícipes de los resultados prósperos o adversos en la proporción que determinen”*.

“*Cuentas en participación*” involves a kind of collaboration between capital and management in order to develop a commercial activity. This associative formula allows one or several people to contribute money or properties to another person with the purpose of taking part of the successful or adverse outcome of the commercial activity which he/she is carrying out on his /her behalf and on his/her own name. It is quite useful for those businessmen who need capital to

develop commercial activities which require large investment but who don't want to show this collaboration creating a legal person. The "cuentas en participación" is a contract but it is not a type of company.

This contract is signed by two parties; "gestor- empresario" and the "participe". Their main obligations are:

a) **Participe:**

- He /she must contribute money or properties in the way which has been agreed in the contract.
- He/she can intervene in the management

b) **Gestor-empresario:**

- He/she must invest all the money and properties received from the "participe" in the commercial activities agreed in the contract.
- He/she must periodically report to the "participe"
- He/she must distribute with the "participe" the successful of adverse outcomes of the commercial activity developed.

The "gestor" is the one who is legally considered businessman and therefore the only one who develops the commercial activity and is able to enter into legal relationships with third parties.

4.- Vocabulary

Partnership- Sociedad personalista

General partnership- Sociedad colectiva

Limited partnership- Sociedad comanditaria

General partner- Socio colectivo

Limited liability partner- Socio comanditario

Assets- Patrimonio, activo de una empresa

To grant a public deed- Otorgar escritura pública

Partner's contributions- Aportaciones de los socios

Capitalist partner- Socio capitalista

Industrial partner- Socio industrial

Exclusion of a partner- Exclusión de socios

To participate in the management of a company- Participar en la administración de la sociedad

To make unanimous decisions- Tomar decisiones por unanimidad

Liquidating dividend- Cuota de liquidación

Company name- Razón social en las sociedades personalistas, denominación social en las sociedades capitalistas

To act on behalf of- Actuar en representación de

To demand damages- Reclamar daños y perjuicios

To indemnify someone for damages- Indemnizar a alguien por daños y perjuicios

To breach an obligation- Incumplir una obligación

To contravene a rule- Contravenir una regla

Outcome of an activity- Resultado económico de una actividad