

# Partnership Agreement

## 1. Consensual contract

- Need to distinguish the contractual relationship from the entity (economic and business entity) which operates on the basis of the partnership agreement.
- Need to distinguish from the Partnership Company under the Commercial Code (which has a statutorily recognised legal personality separate from the partners)
- Partnership agreement under the Civil Code merely creates “contractual” obligations among partners.

## 2. ‘Special’ features of a partnership agreement

- A partner owes duties (including the duty to make contribution) to all partners, not to (a) particular partner(s).
- If a partner is unable to make the agreed contribution, only the particular partner is excluded from the partnership relationship, which is unaffected by the partner’s inability to participate. Partnership is formed among the remaining partners, unless they agree otherwise.
- Warranty liability of a partner to the other partners? Probably not. Partners need to re-negotiate and re-define their relationship. 2005Da38263 (Partnership agreement is not a contract with reciprocity of considerations, not a synallagmatic contract.)
- Usual rules about termination on the basis of a breach of contract do not apply.
- 94Da7157: In a partnership agreement such as a joint-undertaking of a business, a partner may seek dissolution, quit, or remove other partner(s). A partner may not terminate the partnership agreement and seek restoration from the counterpart [unless their agreement stipulates otherwise].

### **3. Similar entities or arrangements**

- Mutual aid scheme ("□"): The organiser has a personal project. The obligations of payment and repayment exist between the organiser and the members of the scheme. Not a partnership. Where the scheme breaks down, no room for seeking 'dissolution' of a partnership. 93Da55465
- Contractors' consortium: a partnership agreement.
- Apartment owners where each of them separately owns a distinct unit of one building. They are in a relationship of partnership.
- 2005Da5140: Joint-owners, in principle, are not in a partnership relationship merely because they are joint-owners. If, however, they have agreed upon the manner of acquisition and disposal of the property, their relationship may be viewed as a partnership.
- If one party agrees not to partake in the profit of the joint undertaking, it cannot be a partnership. 98Da44666
- As long as all parties partake in the profit, they are in a partnership even if it is agreed that some of them do not bear the loss.

### **4. Partner's contributions and partnership assets**

- Anything of value: skills, labour, good will, undertaking not to engage in a line of business.
- All partners must join hands in exercising the claim to seek a partner's agreed contribution.
  - An executive partner may, on behalf of all partners, seek the particular partner's performance of the contribution, which must go to all partners.
  - In the absence of an executive partner, any partner may, on behalf of all partners, seek the performance from the defaulting partner. But this is not the former's personal claim to the latter.
  - An individual partner may not seek 'his portion' of another partner's contribution to the

partnership to be made out to the individual partner. Creditors of a partner may not attach or seek satisfaction from the partner's such claim (because the partner has no such claim in the first place). 97Da4401

- A partner who delays in making the contribution must pay damages and interests to all partners.
- Partnership assets: partners' contributions, assets acquired in the course of the partnership undertaking.
  - All partners join hands in the ownership of each of the assets; No notion of 'individually disposable share', thus distinct from co-ownership.
  - Distinct from individual partner's personal property. Individual partners may not dispose of their 'share' except by consent of all partners. Dividing up of partnership assets requires all partners' consent.
  - Disposal of partnership assets requires all partners' consent (Art. 272). But the 'business decision' for the disposal may be taken by a majority of executive partners, or by a majority of partners where there is no executive partner (Art. 706(2)). The partners who oppose such a decision may not withhold consent to the disposal. If individual partners wish to have such a veto power, they should have explicitly reserved it in the partnership agreement.
  - Creditors of a partner may attach a partner's 'share' of the partnership assets. But this is effective only to the dividends or to the distribution of assets upon dissolution. While the partnership exists, individual partner's 'share' may not be disposed of unless all partners agree.
  - If a partner negligently handles the partnership business and incurs loss, other partner(s) may not seek compensation as individual claimant(s). The

loss is caused to the partnership, not to individual partners. So all remaining partners must join hands in seeking compensation.  
95Da35302, 98Da60484

- A partnership may be recognised even if it has no tangible assets.

## **5. Partnership liabilities**

- All partners bear the partnership liabilities in proportion to their loss-sharing ratio.
- No insulation between a partner's 'share' of the partnership liabilities and the partner's personal assets. (Unlimited liability)
- A creditor of the partnership may either (i) seek satisfaction (for the entirety of the claim) from all partners in respect of the partnership assets themselves or (ii) seek satisfaction (for a portion) from individual partners in respect of their personal assets to the extent of the partner's loss bearing amount.
- If a creditor decides to pursue individual partners,
  - each of them is liable only up to his apportioned amount of liability (with all his personal assets; unlimited liability). However, if the credit arose from a "commercial transaction", each partner shall be jointly liable for the full amount of the credit. Commercial Code 57(1). 92Da30405
  - if the creditor does not know the loss bearing ratio among partners, the creditor may claim an equally divided amount from each partner. Art. 712
  - if any of the partners is insolvent, creditor may claim insolvent partner's portion of liability from the remaining partners (with the amount equally divided up for each remaining partner)

## **6. Conduct of partnership business**

- Partnership agreement may stipulate executive

partner(s). Partners may, by consent of 2/3 of partners, appoint executive partner(s). Art. 706(1). Where executive partners are appointed, non-executive partners may not conduct partnership business. Art. 706(3)

- Partners (executive partners, where they exist) must act with the consent of the majority of partners (executive partners), unless otherwise agreed. Art. 706(2).
- Unless otherwise agreed, each partner (where no executive partner is appointed) or each executive partner is entitled to carry out the 'ordinary day-to-day operation of partnership business' on behalf of all partners (provided that other partners or executive partners do not oppose).
- A partner who conducts the partnership business (not necessarily an executive partner) owes a duty of care to remaining partners. Art. 707 (mandatarius' duty of care; Art 681)
- A partner who conducts the partnership business is presumed to have the power of attorney to act on behalf of all other partners in respect of the business he is carrying out. Art. 709
- 2000Da28506: Disposal or alteration of partnership property does not form part of 'ordinary day-to-day operation of partnership business'.

## Executive partners

- May not resign without justifiable grounds, may not be de-commissioned without consent of all partners. Art. 708
- Owes the duty of care to other partners in carrying out the partnership business. Art. 707 (as well as non-executive partners when they do carry out the partnership business)

## Authorisation among partners

- Counterpart concludes a contract with a partner who acts

on behalf of (with the power of attorney to represent) all partners.

- If a partner concludes the contract in his own name and without indicating that it is on behalf of the partnership, the counterpart may not enforce it against other partners.

#### Loss caused to the partnership

- 98Da60484: An executive partner acted outside his authority and committed conducts which are against his duties. Partnership assets are squandered and it became impossible to achieve the purpose of the partnership. The loss is caused to the partnership. Individual partners may not seek damages in the personal capacity. Remaining partners must join hands in seeking compensation from the defaulting partner.
- Also see 95Da35302: A partner, in order to secure a loan for his personal purpose, offered the partnership property. Upon the partner's default, the property was subject to foreclosure and the partnership lost the property. Remaining partners must join hands in seeking compensation from the culpable partner. Partners may not, in their individual capacity, seek compensation for the loss of their respective 'share' of the partnership property.

#### **7. Distribution of profit**

- In the absence of agreement, the contribution ratio would also be interpreted as the ratio of profit distribution, and vice versa.
- 2005Da16959: Where a partner failed to perform his duty of contribution, the partnership may – in distributing the partnership profit – set off the damages. The partnership may not refuse to distribute the profit to the defaulting partner (defaulting partner is not automatically foreclosed from sharing the profit of the

partnership) in the absence of an agreement to that effect.

## **8. Resignation and dissolution**

### **Resignation**

- If the duration of partnership is unspecified or to last for the lifetime of partners, a partner may resign at any time with a notice to all partners. However, if the resignation is to have adverse consequence for the partnership, the partner may resign only upon unavoidable grounds for resignation. Art. 716(1)
- If the partnership has a definite and limited duration, partners may resign only upon unavoidable grounds for resignation. Art. 716(2)
- Automatic 'resignation'
  - death, bankruptcy, diminution of capacity or expulsion by the partnership
  - 2003Da26020: Partnership agreement or a resolution by partners may not, in principle, validly stipulate that a partner can retain the partner status in spite of his bankruptcy. However, if the creditors of the bankrupt estate agree to the bankrupt partner's retention of partner status, it would be possible for the partner to continue as a partner.
  - 2004Da49693: If a partner 'resigns' from a partnership which was formed by two partners, the partnership agreement comes to an end. But the 'partnership' is not dissolved, and thus there is no need for liquidation of the partnership assets. The remaining 'partner' shall own the partnership property. The remaining partner shall be liable for the partnership liabilities.

### **Dissolution**

- When the partnership achieves its purpose, or is

impossible to achieve its purpose, or when an event stipulated in the partnership agreement as the ground for dissolution of the partnership occurs, or when all partners agree to end the partnership relationship, then the partnership dissolves.

- In the event of unavoidable circumstances which make it impracticable to continue the partnership, a partner may demand dissolution of partnership. Art. 720. Deadlock, breakdown of the relationship of trust, serious depletion of the partnership assets, etc.
- 95Da4957: Bad performance, breakdown of trust. 90Da26300: Even the partner who is responsible for the breakdown of the relationship may demand dissolution.
- 78Da1827: When one of the two partners who formed a partnership seeks dividing up of the partnership property, the demand may be interpreted to be a demand for dissolution of partnership.
- 94Da46268: One partner lodged a criminal complaint against the other partner alleging a breach of trust. The latter was convicted. The former sent a notice of termination of the partnership agreement. It can be interpreted as a demand for dissolution of the partnership.

## **9. Joint-venture partners setting up a joint-stock company**

- The running of the company to be governed by Commercial Code as well as the contract between the JV partners.
- 2003Da22448: Civil Code provisions on partnership contract would also be applicable in addition to the Commercial Code provisions applicable to a joint-stock company.
- Joint-venture agreement or shareholders agreement does not disappear simply because the JV partners set up a joint-stock company.
- 2003Da22448: Civil Code provisions on partnership contract would also be applicable in addition to the Commercial Code provisions applicable to a joint-stock company.



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○○○○ 2005.10.18, ○○, 2005○○583, ○○: “Dong-Up” contract may be interpreted as a partnership contract. The purported “termination” may be interpreted as resignation and demand for the return of contribution. Partners have a comprehensive duty to disclose. A partner’s failure to disclose material facts amounts to “unavoidable circumstances” for another partner to resign.