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Lecture 1

Commercial Partnerships

Partnerships *en nom collectif* & *en commandite*

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Introduction

A contract of a commercial partnership

- An agreement between two or more persons
- Creating a legal relationship between the parties
- Regulated by the Memorandum and Articles of Association or by the deed of partnership



Different forms of commercial partnerships



**Partnership en
nom collectif**



**Partnership en
nom commandite**



**Limited liability
company**

Historical context - developments

Continental Europe

England

Malta

Other notable pieces of legislation:

- Ordinance of 1857
- The Commercial Code – 1942
- The Commercial Partnerships Ordinance – 1965
- The Companies Act, 1995

Validity of a Commercial Partnership

Form

- Constituted by a deed of partnership; drawn up as a private agreement or public deed
- Based on the contribution of the partners
- Must be registered with the Malta Business Registry, and comes into existence with the issuance of a certificate of registration

General requisites under contract law

- Capacity of the contracting parties
- consent
- Subject-matter
- causa



Partnership en nom collectif

“.....may be formed by two or more partners and operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners”

(Article 7, Companies Act)

Charles Attard

vs.

Charmaine Vella and Gerald Vella

(Chief Justice Vincent De Gaetano,
Judges Joseph A. Filletti, Geoffery
Valenzia – Court of Appeal 27
November 2009)

A case which highlights the legal personality of a partnership en nom collectif; wherein the court concluded that although the partners in a partnership en nom collectif are unlimitedly responsible, the responsibility refers to the situation when the assets of the company are not enough to make good for the liabilities.



Name of the partnership

This is the name under which the business of the partnership is carried on and it represents the external manifestation of the juridical distinction between the legal personality of the partnership and the members composing it.

The unlimited liability of the partners for the obligation of the partnership

Each and every partner is liable for the debts and obligations of the partnership with all his property, present and future and **not merely up to the amount contributed by him to the partnership.**

As between the partners, however, each partner is liable for the debts and obligations of the partnership in the proportion fixed in the deed of partnership and, in default, by law.

The joint and several liability of the partners for the obligations of the partnership

Joint and several liability connotes the idea of the ability of the creditor to turn to one of the co-debtors and claim the full amount of the debt owed to him.

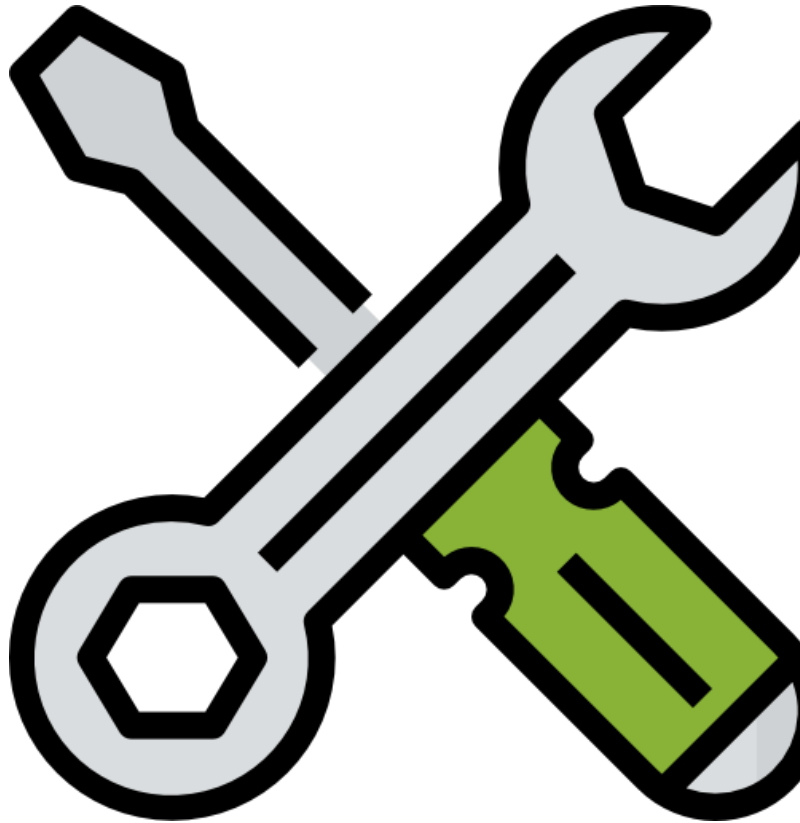
But, the Companies Act says that “no action shall lie against the individual partners unless the property of the partnership has first been discussed.”



Partnership en commandite

This is defined in the Companies Act as a partnership which operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution of one or more partners, called limited partners.

Why are these structures still relevant?



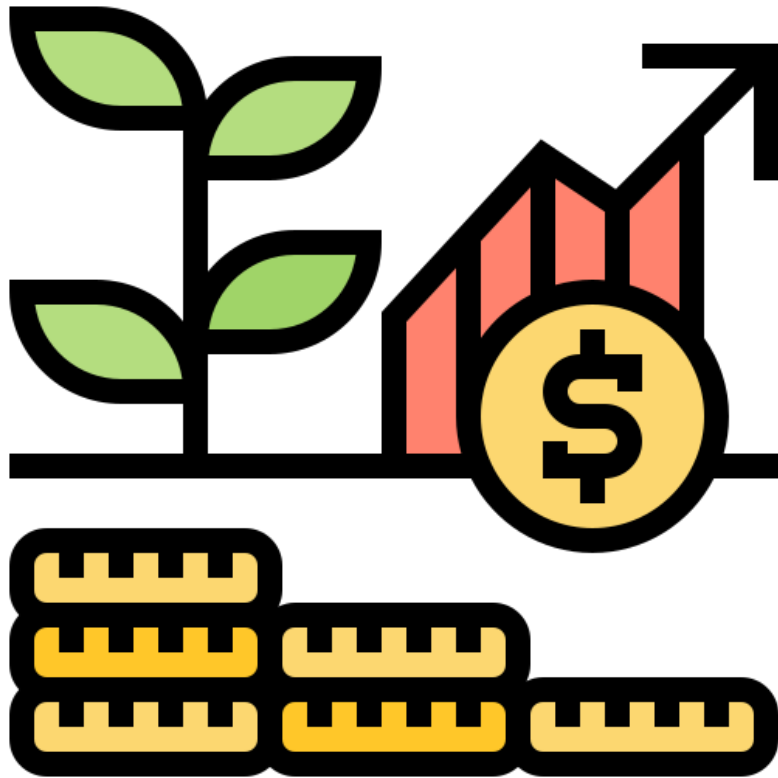
In a limited liability company, **personal skills cannot be contributed.**

In a **partnership**, you can **contribute a service** in return for a share in such partnership.

Partnerships do **not** need to file accounts.

Certain types of partnerships are used in the **funds industry.**

Partnership en commandite as a vehicle for collective investment



A partnership en commandite may be constituted either as a close-ended or as an open-ended collective investment vehicle.

Dissolution

- Expiry of a fixed period for which the partnership was formed
- If all partners so agree (subject to the CA)
- If the partnership is adjudged bankrupt;
- If the number of partners falls below two and remains so for more than 6 months
- If, in the opinion of the Court, there exist grounds of sufficient gravity to warrant dissolution
- In such other cases for which provision is made in the deed of the partnership (subject to the CA)



Revival of a partnership en nom collectif



Application of Francis Mifsud and Anthony Mifsud (February, 2015)

The deed of a partnership

- The name and residence of each of the partners
- The partnership name
- The registered office in Malta
- The objects of the partnership
- The contribution of each of the partners, specifying the value of the respective contribution of every partner
- The period if any, fixed, for the duration of the partnership

(In the case of partnerships en commandite, in addition to the above requirements, the deed must also specify which of the partners are general partners and which of them are limited partners)



The deed of a partnership

Additional clauses - Examples

Profit and losses



Profits and losses are to be borne by the partners in proportion to each partner's contribution

Death of the partners



In the event of death of one of the partners, the remaining partner shall liquidate the deceased partner's interest in the partnership in favour of his heirs unless the surviving partner unanimously elects either to dissolve the partnership or to continue the partnership with the heirs if the heirs so accept.

Fiduciary relationship



Good faith

The relationship between the partners is a fiduciary one of good faith



Fiduciary obligations

The nature of the obligations emerges from the Civil Code and **not** the Companies Act; and includes the exercise of diligence as a *bonus paterfamilias* and to avoid any conflict of interest



Statutory duties

In addition to fiduciary duties, specific statutory duties apply

Other statutory duties are as follows:



To contribute to the partnership within such time and subject to such terms and conditions as may have been agreed to



Not to make use of the partnership's property for own private advantage unless with the consent of the partners



To make good for any damages caused by the partnership through one's own fault



To contribute one's share of losses sustained by the partnership



Unless with the consent of the other partners, a partner may not in competition with the partnership, carry on business on his own account or on account of others or be a partner with unlimited liability in another partnership

Expulsion of a partner

A partner may be **expelled** from the partnership by a decision of the majority in number of the other partners unless a higher majority is required by the partnership deed:

- If he does not make his contribution in accordance with the partnership deed;
- He commits a serious breach of duty as a partner;
- If he carries on business on his own account or on account of others or is a partner with unlimited liability in another partnership in competition with the partnership and without the express consent of the other partners;
- If he is interdicted or incapacitated; and
- In such other cases for which provision is made in the deed of partnership



Discontinuation of partnership

A partner is not entitled to continue as a partner:



If he is adjudged bankrupt; and



If his share is liquidated

Differences between the *en nom collectif* and the *en commandite*

<i>En nom collectif</i>	<i>En commandite</i>
Joint and several liability of partners	General partner is liable for all the obligations of the partnership. The limited partners are only liable in regard to third parties to the amount unpaid on their contribution.
The name of the partnership can be the name of one of the partners	Cannot be name of one of the limited partners
The partners can contribute in any way possible	The general partner can contribute services whereas the limited partner cannot
No need to file audited accounts (certain exceptions apply)	No need to file audited accounts (certain exceptions apply)

Differences between the *en nom collectif* and the *en commandite (cont'd)*

<i>En nom collectif</i>	<i>En commandite</i>
Partners may not set up the plea of the benefit of discussion of any of the other partners. However, a partner may plead the benefit of discussion of the property itself	The liability of the general partners for the obligations of the partnership can only be invoked after the property of the partnership is discussed.
The administration and representation of the partnership vests in each of the partners severally	The administration and representation of the partnership vest in the general partners unless the deed of partnership provides otherwise.
Capital cannot be divided into shares	Capital can be divided into shares
No minimum contribution	No minimum contribution
Relationship between partners is fiduciary	Relationship between partners is fiduciary



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