

By Sebastian Sal*, (1997)

This article will give an overview of the duties of partners, pursuant to the Commercial Companies Act (CCA) of Argentina, commonly known as Law 19.550.

Duty of making contributions

This is the first duty that each partner has. “The contribution to a company is a juridical matter which has for finality to introduce one good to the corporate purpose¹.” It is essential for the normal development of a company that the partners contribute to the creation of a general fund. The contributions given by the partners, are part of the company’s capital. Since then the company is the owner of this goods². The fulfillment of this duty varies according to the company type. Such duty could be fulfilled in accordance with the terms ruled by the CCA or in accordance with the terms established by the bylaws, or since the incorporation when there are any established terms (article 149 for the Limited Liability Companies³, art. 172.3 and 187 for the Corporations⁴ and art.37, all of them of the CCA).

Delay in the contributions

Once the deadline to make a contribution to the company expires, the partner is automatically put in delay. Previous notification to the partner is not necessary. However the partners should be notified, by the company, to be aware of his new status⁵.

* Assistant Professor of Corporations, Universidad de Buenos Aires, Business School. University of Pennsylvania, LL.M candidate 1997

¹ George Ripert, Tratado Elemental de Derecho Comercial, Tomo II, pag.61, Ed. TEA, 1954.- (Translation by the author)

² “López Fernández, Adolfo C/Vivero SRL” CNCom, Sala E, Mayo 24-990 - (unpublished in legal newspapers)

³ In Spanish, Sociedades de Responsabilidad Limitada (S.R.L.)

⁴ In Spanish, Sociedades Anónimas (S.A.)

⁵ “Constructora Atlántida SRL c/ Mizrahi Moisés” CN.Com, Sala A, Octubre 15-1981, E.D. T.97, 366

This circumstances produce the following consequences:

- 1) The possibility (for the partners who fulfilled their obligations) to comply with the contribution plus the caused damages created by the delay.
- 2) The possibility to exclude him from the company (art.37 CCA). By doing so, the unfulfilment could be partial or total.

In the case of corporations the sanction is the automatic suspension of all the rights that the partner posses. The bylaws could establish, among other things, the sale of the partner's shares in a public auction. " That is why, the partial resolution is incompatible with this kind of corporations, because of the nature of the social participation and for the circumstance that in this kind of corporations it does not really matter the person, but the assets that he contributed⁶."

Contribution of assets

There are different kinds of contributions. These could consist of: 1) cash or other monetary document, 2) work (except in the Limited Liability Company and in the Corporations). In limited liability companies and corporations the contribution must be of specific goods. This goods must be determined and susceptible of forced execution (art.38 and 39 CCA), because it could be used as a guarantee to the third parties.

In the duties to turn over, the partner is only required to give to the company the good that he promised to give. The duties to act are not common, but there are usually an exception to the norm.

⁶ Ricardo A.Nissen, "Ley de Sociedades Comerciales", pag. 168. Ed. Abaco, 1982 (translation by the author)

Art.45 CCA establishes that the assets were contributed in ownership, absent a contrary clause in the bylaws. It is necessary when contributing a good to a company, that the contributor has a property right over the good or the right to access to the good⁷.

“The contribution of use or enjoyment is only allowed in some companies (*sociedades de interés*). As a consequence the contributor could not make a claim to the company if the good is totally or partially lost, unless the company or the other partners are responsible for it.⁸”

The final part of article 38 CCA, states that if the contribution’s registration in a registry is required, such shall be done before the name of a company in formation is registered.

Anyway, art.38 does not establish how much in advance must the prior registration be. “This could be a useful way to take the good out of the patrimony of the partner in order to avoid a commercial execution of it by his personal creditors⁹.”

Contribution of rights and credits

Articles 40 and 41 give the possibility to contribute rights and credits so long as these requirement are met:

- 1) They must be documented. The company shall be transferee for the purpose of the company contract.
- 2) They must refer to susceptible contribution assets
- 3) They must be free of litigation.

For example, this kind of contribution could be a contribution of intellectual rights, or a trademark, among others.

⁷ “Raho Laura c/Altamura A.s/inc. de nulidad de contrato” CN.Com. Dres.Alberti, Rotman, Cuarteo , 11/08/92 (unpublished)

⁸ E.H.Richard, I.A.Escuti, José I.Romero, "Manual de Derecho Societario".- Ed.Astrea, 1983.- (translation by the author)

⁹ Ricardo A.Nissen, "Ley de Sociedades Comerciales" pag.172.- Ed. Abaco, 1982 (translation by the author)

The corporation is the owner of the credits contributed by the partner as established in the bylaws. Anyway this right is ineffective to third parties until the corporation is incorporated.

The contributor is liable for the existence and legitimacy of the credit, but not for the solvency of the debtor. That means that the contributor only guaranteed the existence of the credit. It is for this reason that, if the credit could not be collected the partner must pay the credit in cash. This must be done within thirty days.

Quotable securities

Securities quotable on the exchange, may be contributed up to their quotable value. (art.42 CCA). If the securities are unquotable or not normally quoted in a period of three months, they will be valued as established by article 51 CCA.

Encumbered assets

One can contribute encumbered assets, before discounting the sum corresponding to the encumbrance - art.43 CCA-

Contribution of commercial funds

Art.44 CCA allows the contribution of commercial funds, but requires the inventory and valuation of such contribution, and fulfilling the legal provisions that regulated their transfer. One must value the contribution, in accordance with the law 11.687. Law 11.687 has a double objective: 1) to protect the contributor's creditors, who could be left unprotected for the recovery of their debts; 2) to protect the company for the debts of the contributors.

One must file with the business or commercial registry before obtaining the authorization for a full registration of the commercial fund in the name of the company.

Contributions of use or enjoyment assets

The CCA presumed that all the assets were contributed in ownership if there is no express evidence of the contribution of their use or enjoyment -e.g.: as a rent or as an ordinary usufruct -. This kind of contributions are not allow in limited liability companies (art.45 CCA).

Eviction authorizes the exclusion of the partner, without prejudice of his liability for the damage caused. This could be waived, if the partner pays the value of the assets plus compensation damages, or when the assets were changeable for other of the same quality and kind. In any event, the partners must pay the damages caused by their acts (art.47 CCA).

If the contribution of the partner was an ordinary usufruct, in case of eviction, one must apply the solution of art.46 CCA.

The CCA does not say anything about hidden defects in the goods. If the good given as contribution has hidden defects, the unanimous doctrine states that one should apply the rule established in art.46 CCA.

Unless otherwise agreed, the partner shall support the total or partial loss of the contribution of use and enjoyment, if it were not imputable to the company or to any other partner¹⁰. Once the company is dissolved, the partner may demand the restitution of the good in the state in which it shall be found.

Valuation of contributions in kind

¹⁰ If one contributed a good to a company in use or enjoyment, the contributor is in the same situation as a third party respect to the company. He does not have to wait for the payment of all the company's debts in order to asking for the retribution of the good that he contributed, in the state in which it is found, because the owner shall support all the deterioration caused by the use of the good. "Tagle E.c/Fernández Dix L." CN.Com, Sala C, 9/2/79 (unpublished) (translation by the author)

Art.51 CCA holds that contributions in kinds shall be valued in the manner provided in the bylaws, or if not established in the bylaws, in accordance with the market prices, or with the valuation of one or more experts.

In the Limited Liability Co. and in the Simple Limited Co.¹¹ - in this case only for limited liability partners' contributions the antecedents that justify the valuation shall be indicated in the bylaws. The CCA provides that in case of the company's insolvency or bankruptcy the creditors may oppose to the valuation within five years from the time that the bylaws were made. When the valuation is carried out in a judicial process, the suit shall not proceed.

The limited liability partners in the Simple Limited Co., and the Limited Liability Co.'s partners, are liable with their own patrimony and in "in solidum" if there is any difference between the value assigned and the real value of the contribution at the time when the good was given to company.

A partner affected by the valuation may fundamentally oppose it within the five working days from notification, and the Registration Court shall solve the matter after hearing the intervening experts - art.52 CCA-. One could appeal this decision.

Corporations

In the case of corporations, the valuation shall be approved by controller -art.43 CCA-. This must be made: 1) by the market value, when dealing with assets with a current value; 2) by expert valuation, when in the controller's judgment this valuation could not be replaced by the valuation of state division or official banks.

The last part of art.53 allows contributions for lesser value than their valuation. In this case, the contributor shall pay the difference if the other partners - who possess 3/4 parts of the capital- do not accept the reduction in the contribution.

¹¹ In Spanish, Sociedad en Comandita Simple (S.C.S.)

Finally, this valuation could be refuted, using the proceeding established by art. 169 CCA.

Accessory profits

The accessory profits are clearly different from the contributions because this benefit shall not be integrated into the capital. Art.50 establishes four exigencies that are important to discuss:

- 1) They shall be made by contract, and one may include its content, duration, nature, consideration and sanctions in case of non-performance. If they did not result from the contract, they shall be considered as third party obligations.
- 2) They shall be clearly distinguished from contributions
- 3) They cannot be made in cash
- 4) They can only be modified in accordance with the agreement or, in the absence of such in accordance with the obligated parties and the required majority for the reform of the contract.

When they are connected to quotas of Limited Liability Co., their transfer shall require in all the cases the majority established by art.152 CCA.

Moreover, if they are related to shares, this must be nominative and the board of director's consent is required.

Duty of exercise the government of the company

The partners shall govern and represent of the company or avoid to do so. Shall establish whether the bylaws or other legal rules.

All partners shall manage the company if the bylaws does not establish the how the company should be managed. -art.127 CCA. for the General Partnership¹². This results in a great responsibility to the partners as a result of their omissions in the administration of the company. In addition they must be accountable to each other.

¹² In Spanish "Sociedad Colectiva" (S.C.)

This right could change, depending on the kind of company. In the Simple Limited Co., the rule of art.127 CCA is applied to the partnership members - art.136 CCA -, keeping the active partner members out of the administration-art.137 CCA.-

The administration of the Limited Liability Co. is ruled by art.157, which require the appointment of one or more managers. In the corporations, the administration is a duty of the board of directors - art.225 CCA-. The names of the board of directors must be registered, in order to free the partners from the obligation of the management in front of third parties¹³. Anyway, all the parties have the right to control the administration.-art.55 CCA.

Duty of giving to the company's capital the application established by bylaws

The administrator must give the company's capital the application established in the bylaw, given that this is the purpose of the creation of the company. The administrator cannot assign this money for any other purpose. If he/she does assign the money for another purpose, he/she must return this fund, and pay the indemnization without compensation in the event that his/her act resulted in any profit.

Besides, if a partner uses this fund to make his "own business", he must give to the company all the profit that he has obtained. If he/she loses money, he/she must support the debt by himself/herself.

Duty of support the negative balance

It is logical that all the partners must support the deficit of the company. This situation varies for different kinds of companies.

Notwithstanding this, if the partner is jointly liable joint and limited liable for the debt of the company, he/she could use the benefit of excussio -art.56 CCA-. That means that the creditors must

¹³ "Agrícola Ganadera La Marca SRL" CNCom, Sala D, [1992-A] L.L. 222 -

first try to obtain the payment of their credits from the social capital. This right must be alleged by the partners.

The benefit of excussio disappears upon the company's bankruptcy .

Duty of Loyalty

The partner must act with loyalty towards the company. He/she must sacrifice his/her personal interest which are contrary to the social interest, in order to obtain the social purpose.

Art.133 CCA is an example of this duty. This article prohibits the General Partnership's partners to execute any transaction in competition with the partnership, except by express and unanimous consent of the rest of the partners.

Besides the partner could not hinder the decisions of the company because he/she has commercial contrary interest with the company. This hypothesis is more common in the companies which have partners with limited liability. The doctrine states that the partner in these circumstances should not be allowed to vote. -art.159 and 248 CCA.-

The violation of this prohibition authorizes the exclusion of the member, the incorporation of obtained benefits and the indemnization of damages. Furthermore, the company could claim the close of all partner's commercial business.¹⁴

Finally, the partner cannot be a member of another company which has the same social purpose as the first one.

Conclusion

This piece has presented an overview of the duties of the partners in Argentine companies.

¹⁴ art.633 Cód. Civ.