(2018) 6 NIBLeJ 7

Current Problems in Italian Partnership Law

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Introduction

The interest in partnership law is currently experiencing a period of renewed intensity among EU countries' domestic legal systems, although partnership law has not yet experienced a process of harmonization. Firstly, some systems have undergone important legislative innovations (such as, for example, the Italian law on conversion,[1] noted as the most significant reform of partnership law in Italy since the enactment of the Italian Civil Code).[2] In other cases, there is ongoing (Germany-Netherlands) or completed (Austria) general reforms of the partnership legal framework.[3] Secondly, in most European legal systems there have been recent and important interpretative developments inspired by significant cases from the relevant domestic Supreme Courts.[4] Finally, in some countries, such as in the United States or the UK,[5] there is an increasing number of partnerships (in particular: limited partnerships and limited liability partnerships).

With regard to this last statistical consideration, Italy is facing a reverse trend. In the last decade, the number of private companies has for the first time balanced the number of registered partnerships, during the last few years, the gap between private companies (1,669,128 in the first quarter of 2018) and partnerships (1,006,001 registered during the same period) has become wider.[6] Such an increase in the number of companies in Italy, especially with regard to the *società a*

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[1] Article 2500-*ter* of the Italian Civil Code: see further belowon the amendments of the partnership agreement.

[2] Luca Pisani, 'Il Principio di Maggioranza nella Nuova Disciplina della Trasformazione di Società di Persone' [2005] Riv Dir Comm 371.

[3] See references in Marco Speranzin, 'Responsabilità dei Soci per le Obbligazioni Sociali: Profili Sostanziali e Concorsuali' (2017) 92(2) Dir Fall 312.

[4] See Karsten Schmidt, 'Die Personengesellschaft als Juristentagsthema' (2016) 180 ZHR 411, 413: partnership law is mostly judge made law from Italian jurisprudence.

[5] Larry E Ribstein, 'The Rise of the Uncorporation' (Oxford University Press 2010) 3 and following, and Joseph A McCahery, Erik PM Vermeulen, and Priyanka Priydershini, 'A Primer on the Uncorporation' (2013) 14(3) EBOR 305.

[6] Movimprese I trimestre 2018 – Totale <www.infocamere.it/movi/cgi/roberto?pGeoTk=IT&pTipTk=I&pPerTk=12018> accessed 29 May 2018.

responsabilità limitata (comparable to the English private company), is due to the reduction of the minimum capital amount required to establish such a company, which has been reduced to 1 euro as a result of European regulatory competition,[7] but also to some other important provisions regarding freedom of contract and high flexibility.

This article aims to explore the main characteristics of Italian partnership law, which is regulated by the Italian Civil Code of 1942, in the light of the most recent legislative innovations and case law, with specific reference to the decisions of the Italian Supreme Court,[8] in order to stress the legal problems of Italian partnerships that need to be analysed and clarified for the purposes of ensuring that partnerships remain able to compete with private companies as a convenient business form.

Types of Partnerships under Italian Law

The Italian Civil Code provides for three types of partnership business forms: *società semplice* (*s.s.*), *società in nome collettivo* (*s.n.c.*), and *società in accomandita semplice* (*s.a.s.*). Such partnership types have different characteristics and satisfy different business needs, which are briefly summarized in the following paragraphs. All partnerships are entities distinct from the partners (see Articles 2266 and 2659 of the Italian Civil Code), even if - as will be seen - partners are liable to some extent for a partnership's obligations.[9]

Società Semplice (s.s.)

Società semplice (*s.s.*) is the first legal model provided by the Italian Civil Code and is the basis for two of the other types of partnership discussed below: the *società in nome collettivo* (*s.n.c.*) and the *società in accomandita semplice* (*s.a.s.*).

According to Italian law, an *s.s.* cannot undertake any kind of commercial activity (such as industrial and trading activities). For historical reasons,[10] it can only be chosen - and it is the default legal model even if not chosen or if the partnership agreement has not been made in writing - for agricultural, professional, or holding

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[7] See Alessio Bartolacelli, 'Almost Capital-less Companies in Europe: Trend, Variations, Competition' (2017) 14(1) ECFR 187.

[8] Under Italian law, the judicial system works on three levels. The Court of first instance is the *Tribunale*. The judgments issued by the *Tribunale* can be appealed to the *Corte di Appello*. Finally, the rulings of the *Corte di Appello*, if affected by legal (and not factual) mistakes, can be appealed to the *Corte di Cassazione*, which is the Italian Supreme Court. Please note that conflicts concerning partnerships are not subject to a specialized Court as are company law conflict that are subject to *Tribunale delle imprese*, which is a specialized Court.

[9] The meaning of the partnerships' entities theory as accepted under Italian law and the difference between partnerships and companies as entities is well explained in Gian Franco Campobasso, *Diritto commerciale, 2, Diritto delle società* (9th edition, UTET 2015) 41 and following.

[10] Oreste Cagnasso, 'La Società Semplice' in Rodolfo Sacco, *I Singoli Contratti* (UTET 1998) 40 and following.

(financial or real estate) activities.[11] Pursuant to the default rule set under Article 2267 of the Italian Civil Code, all partners of an *s.s.* have unlimited, joint and several liability for all partnership obligations (except if otherwise provided for, but only in case of non-managing partners).[12] Though not mandatory, an *s.s.* can be registered in a special section of the Business Register, which is the central register of businesses in Italy.[13]

Società in Nome Collettivo (s.n.c.)

Under Italian business law, the s*ocietà in nome collettivo* is particularly relevant to partnerships carrying out commercial activities: it is the default business form applied to *de facto* commercial activities (*de facto societas*), i.e. those businesses running commercial activities in the absence of written or oral agreements between the partners[14] and it is the basis for the *società in accomandita semplice* (*s.a.s.*), discussed below, which is also important to commercial businesses. Moreover, pursuant to Article 2291 of the Italian Civil Code, an *s.n.c.* is characterized as the only commercial partnership under Italian business law in which all partners have unlimited, joint and several liability for all the partnership's obligations.[15]

Società in Accomandita Semplice (s.a.s.)

Società in accomandita semplice is the Italian limited partnership, and has two categories of partners:

(i) *Soci accomandatari* (general partners) who are liable for managing the entity. Pursuant to Article 2312 of the Italian Civil Code they have unlimited, joint and several liability for partnership debts and obligations; and

(ii) *Soci accomandanti* (limited partners) who are not permitted a role in managing the entity and, as a consequence, have no personal liability for partnership debts and obligations besides their capital contribution,[16]

[11] Campobasso (n 9) 55 and following. The possible use of an *s.s.* as a holding institution is now recognized: see *Tribunale di Roma* (8 May 2016); Consiglio Nazionale del Notariato, *Dalla Società Civile alla Società Semplice di Mero Godimento* (2016) (Studio di Impresa n. 69-2016).
[12] Under Italian law partners may not be managers: see below on *società semplice* partners' liability and management of partnerships.
[13] Regulated by D.P.R. n. 581/1995, "Regolamento di attuazione dell'art. 8 della L. 29 dicembre 1993, n. 580, in materia di istituzione del registro delle imprese di cui all'art. 2188 del codice civile". See Carlo Ibba, 'Il 'Sistema' della Pubblicità d'Impresa Oggi' (2005) 51(6) Rivista di Diritto Civile 587.
[14] *S.n.c.* can be registered or not in the general section of the Business Register; if registered it can benefit from a favoured legal regime, in particular concerning the protection of the partners towards partnership's creditors. See for example Article 2297 and 2298 of the Italian Civil Code and below on partners' liability and *amplius* Carlo Ibba (n 13).
[15] See below on *società in nome collettivo* partners' liability.
[16] Campobasso (n 9) 122 and following.

which is compulsory, even if the law does not provide for a minimum amount.[17]

The need for the two categories of partners to be contemporaneously present in the partnership's structure is such that, pursuant to Article 2323 of the Italian Civil Code, if either all limited partners or all general partners cease to be partners, the partnership must dissolve, unless more such partners are appointed within six months.

The limited partnership also has particular importance in Italy as a legal instrument for family businesses, especially in cases in which the general partner is a limited company, similar to the German model of the GmbH & Co KG.[18] The choice of opting for a limited company as a general partner of the partnership allows the enterprise to avoid any unlimited liability on any physical persons and to assign the limited partner's interests in the partnership to the family members who are not in charge of the management.[19]

Amendments of the Partnership Agreement

Pursuant to Article 2252 of the Italian Civil Code, the partnership agreement may be amended only with the consent of all partners, unless otherwise agreed. The consent of all partners, which does not require a formal procedure, in contrast to by-law amendments in company law,[20] is required both for (i) objective or administrative amendments, i.e. the ones concerning amendments of the rules governing the business, such as the transfer of the registered office or the governance system; and (ii) subjective or personal amendments, concerning directly the partners as persons or entities,[21] such as the inclusion of a new partner or the transfer of interest in a partnership.

Objective or Administrative Amendments

In the light of the above-mentioned provision, scholars[22] have traditionally argued that the unanimity rule should be considered as the default rule under Italian law

[17] Under Italian partnership law, the legal capital is generally considered to be a mean to establish the extent of the profits and losses of the partnership and to confer the financial and management rights to the partners. However, the actual importance and role of the legal capital in partnership law is still under discussion: see Marco Saverio Spolidoro, 'Sul Capitale delle Società di Persone' (2001) 46(1) Riv Soc 790.
[18] See Holger Fleischer and Till Wansleben, 'Die GmbH & Co. KG in den Auslandsrechten' (2017) 12 GmbHR 633.
[19] See below on the management of partnerships.
[20] Italian case law: see for example Cassazione Civile [1996] 6394; Cassazione Civile [1998] 153; Tribunale di Milano [24 September 2014].
[21] Since 2003 Italian partnership law allows an entity (partnership; company; association etc.) to be partner of a partnership. Before 2003 Italian case law was against such a possibility: see Cassazione Civile, Sezioni Unite [1988] 5636.
[22] Antonio Serra, *Unanimità e Maggioranza nelle Società di Persone* (Giuffrè 1980) 175 and following.

with regard to amendments of the partnership agreement. Therefore, under Italian partnership law, a partner cannot be subjected to any amendment of the partnership agreement without his consent. This rule aims to protect partners' autonomy as well as their power to influence the most important decisions of the partnership.

However, this can be detrimental, particularly to the ability of partnership law to rapidly accommodate changes in businesses. Thus, as a result of the problems potentially arising from the application of the unanimity rule, Article 2252 of the Italian Civil Code provides for the possibility for partners to waive the rule by choosing alternative regimes, more suitable to the necessity of promptly adapting partnership agreements to changing business needs. The majority rule is an alternative regime which may be chosen by partners and which could be applied to every decision. According to most scholars,[23] partners can choose to calculate the majority on the basis of (i) their share of profit participation, (ii) their capital participation, or (iii) the number of partners.

Further, recent legal reforms have provided for the majority to be sufficient as a default rule in order to approve some significant partnership decisions, including (pursuant to Articles 2500-*ter*, 2502 and 2506-*ter* of the Italian Civil Code) the conversion of partnerships into private companies, the merger between a partnership and other partnerships, or companies and the partnerships' division.[24] In addition, according to some Italian Courts' decisions,[25] partners may decide by majority not only to carry out the above-mentioned operations, but also to amend the partnership agreement in order to execute the conversion or the merger (for example, modification of the governance rules and assignation of management power only to some former partners).[26] Accordingly, the dissenting partners have to bear the decision taken by the majority unless they can challenge the relevant decision for breach of good faith[27] or choose to exercise their exit right (with a connected right to be liquidated at a fair value by the partnership). With regards to such considerations, despite the unanimity rule having been considered for decades as being the default rule for amendments of partnership agreements, the above-mentioned reforms question for the first time the central role of the consent of all partners under Italian partnership law.[28] Therefore, it may be argued that these new provisions could be interpreted such that the majority rule could be applied not

[23] Luca Pisani, 'Le Società di Persone' in Marco Cian, *Diritto Commerciale* (2nd edition, Giappichelli 2017) 121.
[24] Like a private company, a partnership can be divided pursuant to the regulation provided by Directive (EU) 2017/1132, as implemented by Italian law.
[25] Tribunale di Asti [1st August 2016].
[26] See Marco Speranzin, 'Trasformazione di Società di Persone' in Antonio Serra, *Trasformazione, Fusione, Scissione* (Zanichelli 2014) 59 and following.
[27] Marco Speranzin, 'Modifica a Maggioranza del Contratto di Società di Persone: dai Diritti Indisponibili dei Soci al Controllo di Buona Fede' [2017] 1 Riv Dir Soc 281. On the same theme, see BGH [21ottobre 2014] *II ZR 784/13* (OLG Hamm) [2017] in Riv Dir Soc 276 and Lars Klohn, 'Minderheitenschutz im Personengesellschafstrecht' (2016) 216(1) Archiv fuer die civilistische Praxis 281.
[28] Pisani (n 2) 381 and following..

only to the decisions of the partnerships in which the partners opted for its application,[29] but also to some decisions in which partners did not expressly waive the rule. It is the opinion of the author, however, that such an interpretation should not be followed: the consent of all partners should be maintained as a default rule, unless otherwise provided by the partnership agreement.

Subjective or Personal Amendments

As previously mentioned, under Italian partnership law, even subjective or personal amendments require the consent of all partners. A typical case of a subjective amendment is the inclusion of a new partner as a consequence of an *inter vivos* transfer of an interest in the partnership. Italian law confers significant importance on the trust among partners (the so-called *intuitus personae*),[30] given the fact that all partners have unlimited, joint and several liability for all partnership obligations and that they are managers of the partnership in absence of agreement to the contrary.

However, it is deemed acceptable for partners to waive *ex ante* the unanimity rule in order to set up a regime for free transferability of the interests in the partnership. In the practice of Italian partnership agreements, clauses that either allow the free transfer of interests by removing every restriction to their transferability or pre-emption clauses are often found, which provide the right of the partners to acquire an interest before it can be offered to any other person or entity.[31] The transfer concerns management as well as economic rights.

The general partners' interests cannot be freely transferred even *mortis causa*. As a default rule, Article 2284 of the Italian Civil Code provides that if a partner dies, the partnership shall liquidate his interest to his heirs at a fair value, conferring stability on the partnership's management, because the continuing partners cannot be forced to accept a new partner. However, even in such a case, the partners may waive the unanimity default rule and opt for different solutions. The most common solutions are to insert a so-called continuation clause into the partnership agreement, which allows the free transfer of interests to the consenting heirs of the dead partner, or to dissolve the partnership for subjective reasons. However, each of these solutions means that an amendment to the partnership agreement shall be decided after the death with the consent of all remaining partners (expect for the

[29] In this sense see also German case law, BGH [21ottobre 2014] *II ZR 784/13* (OLG Hamm) [2017] 1 Riv Dir Soc 276.

[30] Therefore, partners are bound by a duty of good faith among themselves (Article 1375 of the Italian Civil Code) and by a not-to-compete duty (Article 2301 of the Italian Civil Code).

[31] Paolo Piscitello, *Società di persone a struttura aperta e circolazione delle quote* (Giappichelli 1995) 42 and following.

cases in which the partners have provided for the majority rule in the partnership agreement).[32]

By way of exception to the restricted transferability of interests in a partnership, the transfer of a limited partners' interests is differently (and less strictly) regulated by the law, considering their different position. Pursuant to Article 2322 of the Italian Civil Code, the limited partner's interest (i) can be freely transferred in case of death of the limited partner and (ii) can be transferred *inter vivos* with the consent of the majority of partners, except if otherwise provided in the partnership agreement.

Foreclosure of a Partner's Interests

Since the transfers of partners' interests requires as a default rule the consent of all partners, partners' personal creditors cannot foreclose on those interests (see Article 2305 of the Italian Civil Code), because it would result in third party transferees (the personal creditors) to exercise management rights in the partnership and this would not be in accordance with the personal trust among partners. According to some Italian Courts' decisions,[33] partners' personal creditors can foreclose on the interests of their debtors only when the partnership agreement contains a general clause that allows the free transfer of interests or a pre-emption clause, or if the interest to be foreclosed is the limited partner's interest.

Exit Rights

Partners cannot unilaterally dissolve the firm.[34] However, Article 2285 of the Italian Civil Code provides for the exit right of partners, and distinguishes the cases in which the partners opted for a partnership with no specific duration from the cases in which the partners set out a fixed-term partnership. With regard to partnerships without a determined duration, or in any case in which the partnership agreement provides for a duration equal to the entire life of one of the partners, Italian law[35] provides for no on the exercise of the exit right, other than an obligation to observe a three month notice period. The same rule applies, according to scholars,[36] even to cases in which the duration of the partnership exceeds the average life expectancy of a human being. In contrast, with regard to the case of a fixed-term partnership, which is the usual case in partnership agreements, the exit right can be exercised by a partner only (i) upon the occurrence of a specific

[32] Luca Pisani (n 23) 128 and following; and Gian Carlo Maria Rivolta, *La Partecipazione Sociale* (Giuffrè 1965) 327 and following.
[33] Cassazione Civile [2002] 15605; Corte d'Appello di Trento [7th July 2016]; Campobasso (n 9) 86 and following.
[34] See Article 2272 of the Italian Civil Code, which provides for the partnerships' dissolution causes.
[35] See Article 2285 of the Italian Civil Code and Campobasso (n 9) 109 and following.
[36] Pisani (n 23) 131 and following.

material cause or (ii) if such a right has been provided for specific reasons and inserted into the partnership agreement.

As to the first condition provided for provided by law, jurisprudence and scholars tend to construe the legal concept of material cause in different ways. On one hand traditional Italian case law considers as a material cause an objectively detrimental behaviour by other partners, such as altering the fiduciary trust among them.[37] On the other, scholars look at the material cause as every situation that alters the original economic risk of the investment or that worsens the conditions of the liability of partners (such as conflicts arising among partners).[38] Neither of these interpretations, however, seem to consider the situation regarding the person of the partner (such as illness, age) as being a relevant material cause for the purpose of Article 2285 of the Italian Civil Code, as some scholars correctly outline.[39] With regard to the second condition, partners have wide contractual freedom to establish the specific provisions concerning the exit right in the partnership agreement. However, it is not common in practice to include such provisions.

As previously mentioned,[40] Italian law currently provides for one further case in which it is possible for the partners to exit the partnership, i.e. when the partners have not given their consent in favour of a conversion (Article 2500-*ter* of the Italian Civil Code), a merger (Article 2502 of the Italian Civil Code), or a division (Article 2506-*ter* of the Italian Civil Code) involving the partnership. In such cases the exit right is connected to the lack of consent of a partner as to the material decision taken by the majority. This same reasoning has been adopted by scholars to argue that the right to exit should be extended either with regard to all significant amendments decided by the majority of partners or in those cases in which the unanimity rule has been waived or in those cases in which the majority rule may be inferred by means of interpretation.[41]

In any case, when a partner decides to exercise an exit right, his interest will be liquidated by the partnership (see Article 2289 of the Italian Civil Code) at a fair value assessed by the remaining partners, unless a clause in the partnership agreement provides to the contrary. The value may be set at a lower level as well.[42]

Management of Partnerships and Authority Powers

Article 2257 of the Italian Civil Code sets the default rule as to the management of partnerships. It provides that each partner is *ex lege* entitled to manage the partnership, and to do it separately from the other partners. A partner is therefore

[37] Cassazione Civile [2000] 1602; Cassazione Civile [1966] 2454.
[38] Pisani (n 23) 131 and following.
[39] Campobasso (n 9) 110, nt. 122.
[40] See above on the amendments of the partnership agreement.
[41] See Speranzin (n 26) 60 and paragraph 3, footnotes 29 and 30.
[42] Campobasso (n 9) 113.

entitled to take any decision without having previously involved the other partners in the decision-making process.[43] This regime requires a high degree of trust among the partners, since it gives any one of them the power (as well as the right) to run the business autonomously and therefore to generate obligations for the partnership (and as a general consequence for its partners). However, the risk of a partner entering into obligations without the other partners' consent is - at least potentially - tempered by paragraph 2 of Article 2257, which stipulates that each partner, who is also an *ex lege* a manager (except if otherwise provided for in the partnership agreement), has the right to oppose the operation that other partners intend to carry out before it is executed. Such an opposition produces the double effect of immediately paralyzing the operation and conferring upon the majority of partners the right to decide whether the contested operation should be carried out or not. However, the efficacy of this safeguard is impaired due to the fact that a partner has no legal duty to inform the others with regard to the decision he or she intends to take. Therefore, the other managing partners will learn about the operation only if the relevant partner has decided to inform them on a spontaneous basis or if they have acquired such an information autonomously.[44]

Italian partnership law, however, allows partners to waive the default rule concerning the management of partners and choose an alternative management regime. Article 2258 of the Italian Civil Code enables the partners to opt for inserting a clause into the partnership agreement that provides for management decisions to be taken with the consent of all partners or by a majority of them. The unanimity option has advantages and disadvantages. On one hand, it allows the partners to make shared management decisions. On the other hand, it lengthens the decision-making times and increases the risk of not taking decisions at all due to deadlock. In order to reduce the risk of deadlock, the law provides that if a partnership agreement requires unanimity so that partners cannot undertake any kind of operation by themselves, this can be waived in order to allow the partners to intervene autonomously in case of urgent need to prevent the occurrence of damage to the partnership assets.[45] If the majority option is adopted, the law requires the majority to be calculated on the basis of the criterion of the share of profit participation in the partnership and seems to offer the partners a balanced alternative to lower the risks connected to the default regime or to the choice of the unanimity rule.

By way of further exception to the default rule that all partners are entitled to manage the partnership, the management power of each partner may be removed with the consent of the other partners or a Court decision (Article 2259 of the Italian Civil Code). This so-called *revoca* removes the status of manager held by the partner (who becomes a simple partner from then on) and needs a specific

[43] ibid 88 and following and Pisani (n 23) 102.
[44] Pisani (n 23) 102.
[45] Campobasso (n 9) 90. An example of an urgent need may be the necessity to take an immediate decision because of the imminent expiration of a procedural or substantive term.

material cause[46] if the partner has been appointed as a manager in the partnership agreement. The material cause is, however, not necessary if he or she has been appointed by an agreement other than the partnership agreement.[47]

The power to manage the partnership is different from the power to represent it and exercise authority on its behalf. The latter results in manifesting the partnership's will towards third parties and entails the acquiring of rights as well as the entering into obligations on behalf of the partnership. The regulation concerning the power of representation is set out by Article 2266 of the Italian Civil Code, which specifies that each of the partners has not only equal rights to manage and administer the partnership business, but also has equal power to bind the firm towards third parties. The power extends to all business acts falling within the typical activity of the particular partnership, except for the limitations resulting from the partnership agreement or the power of attorney, which are not effective to bind third parties, unless such limitations have been registered in the Business Register or it can be proved that the third party otherwise knew of them. The partners are entitled to insert a clause into the partnership agreement separating the management power from the power of representation and can assign it either to only one or to some of the partners.[48]

The managers' liability is a particularly problematic topic under Italian partnership law, since the regulation on the subject turns out to be extensively lacking, especially in comparison to the relevant regulation provided with regard to companies.[49] Article 2260 of the Italian Civil Code provides for the liability of the partner-managers towards the partnership, stating that they are jointly and severally liable for damages to the partnership for the breach of any obligations imposed by the law or the partnership agreement. With regard to the liability of the managing partner towards the other partners or third parties, however, there are no specific provisions. Scholars and jurisprudence[50] have tried to fill this regulatory vacuum by means of the application by analogy of the regulation provided for companies. On this basis and by applying Article 2395 of the Italian Civil Code, recent judgments[51] have argued that a partner or a third party has the right to

[46] For example, Italian case law held the repeated absences of the manager, false accountings, unauthorized use of the partnership's assets etc to be material causes.
[47] In such a case, a removal decided without a material cause only gives the partner the right to be indemnified: Article 2259, second paragraph of the Italian Civil Code.
[48] Pisani (n 23) 107 and following. It is rather usual to insert into the partnership agreement a clause pursuant to which each managing partner may individually execute ordinary operations, extraordinary only with the consent of all managing partners.
[49] Pisani (n 23) 112.
[50] Cassazione Civile [2016] 1261 and Alessandra Zanardo, 'Legittimazione all'Esercizio dell'Azione Sociale di Responsabilità nelle Società di Persone: una Questione Ancora Aperta' (2017) 44 Giurisprudenza Commerciale 407. The discussion about managers' liability in partnership law is still problematic also in a comparative perspective: see Holger Fleischer and Lars Harzmeier, 'Die Actio Pro Socio im Personengesellschaftsrecht' (2017) 46(3) ZGR 239.
[51] Cassazione Civile [2016] 1261.

directly sue a manager of the partnership in every case in which they suffered damages as a direct consequence of a business act carried out by the managers.

Partners' Liability

The partners of a *s.n.c.* or an *s.s.*, as well as general partners of an *s.a.s.*, have unlimited joint and several liability for all partnership obligations. The liability is strictly connected to the status of partner, as a party to the partnership agreement, irrespective of whether the partner is also a manager.[52] Under Italian partnership law, business conduct attracts liability for the partnership's debts and obligations as a general legal rule and such a liability is construed strictly.[53]

Firstly, pursuant to Article 2740 of the Italian Civil Code, the liability of partners is full and unlimited: the partners are in this sense liable for any of the partnership's obligations with all their personal assets, without the possibility for the partners to restrict it or place any condition on it.[54] Secondly, the liability is joint and several, which means that the creditors are entitled to ask for the payment of the full amount of every partnership obligation to each of the partners. The fulfilment of an obligation carried out by one of the partners discharges the obligation owed by all of the other partners.

With regard to the nature of the liability of partners for the partnership's obligations, there are two opposing views with important different consequences.

On the one hand, case law[55] opts for considering the partners directly and personally liable for the partnership's obligations, relying on the concept that the title of the credit is the same and sole (*eadem causa obligandi*). As a consequence of such a view, (i) the partners who have paid a debt of the partnership do not have the right to ask the partnership to reimburse them but only have the right to obtain the payment of their quota *pro rata* from the partners considering their share of participation, and (ii) the judgment on the partnership claim may be enforced directly against the partners, without the necessity for creditors also to sue the partners in the same proceedings.

On the other hand, however, scholars[56] claim that the partnership is fully as well as autonomously liable for the fulfilment of its obligations; in this sense, partners' liability should be considered more properly as being a *mere indirect liability*, as

[52] Pisani (n 23) 95.
[53] Carlo Angelici, 'Variazioni su Responsabilità e Irresponsabilità del Socio', in Luigi Arturo Bianchi, Federico Ghezzi, and Mario Notari (eds), *Diritto, Mercato, ed Etica. Dopo La Crisi: Omaggio a Piergaetano Marchetti* (Universita Bocconi 2010) 191-228, 200.
[54] Speranzin (n 3) 314.
[55] Cassazione Civile [1999] 12310; Cassazione Civile [2006] 23669; Cassazione Civile [2007] 18312; Cassazione Sezioni Unite [2015] 3022.
[56] See for references Speranzin (n 3) 317. Recently following this second view Cassazione Civile [2018] 6650: partners are «garanti ex lege».

in case of personal guarantees or suretyships. Thus, according to this theory, (i) the partners who have fulfilled the partnership's obligations are entitled to be fully reimbursed by the partnership (or by the other partners), and (ii) the creditors cannot lawfully enforce the judgment issued against the partnership on the partners whom have not taken part in the proceedings.

Finally, according to Article 2304 of the Italian Civil Code the liability of partners for the partnership's obligations is vicarious. This means that the creditors of the partnership cannot take any legal action against the partners without having previously attempted to enforce against the partnership assets (the so-called exhaustion rule or *beneficium excussionis*). Therefore, partners become personally liable only if the partnership's assets are exhausted at the end of the enforcement proceeding, and are not directly liable for partnership debts as long as the partnership is able to fulfil its obligations. This position is probably the main reason why the theory supported by scholars should be deemed preferable.

With reference to the exhaustion rule, a slightly different regulation applies to an *s.s.*, and to any *s.n.c.* or *s.a.s.* which is not registered in the Business Register. Their partners, unlike the partners of a registered *s.n.c.* or *s.a.s.*, can be directly subjected to enforcement proceedings but may avoid them by showing that there are partnership's assets which are available and of a sufficient amount to fulfil obligations to creditors.[57] Italian partnership law, however, provides for the possibility for the partners to opt for different liability regimes (for example to provide that only some partners are liable for the partnership's obligations) by inserting a specific clause into the partnership agreement to this effect. However, as provided for by Article 2291 of the Italian Civil Code, such agreements are not binding on third parties (and in particular creditors) in respect of an *s.n.c.* or in relation to the general partners of an *s.a.s.*, irrespective of whether the third parties have acted in good faith or not. The above-mentioned agreements are in this sense only binding among the partners themselves.

In contrast, in an *s.s.* (pursuant to Article 2267 of the Italian Civil Code), the agreements among the partners that are aimed at establishing a different regime with regard to partners' personal liability are also binding for third parties (and creditors) under certain conditions. It is required that (i) at least one of the partners remains fully liable for the partnership obligations; (ii) the partners who are not liable towards third parties do not have the power to manage the partnership; and (iii) in order to make the restriction of liability enforceable against third parties, these need to be informed of the existence of the agreement providing for the restriction through disclosure in the Business Register or other appropriate means (i.e. personal registered notice sent to each creditor).[58]

[57] Pisani (n 23).
[58] ibid 171.

Limited Partners' Liability

Pursuant to Article 2317 of the Italian Civil Code, the limited partners of an *s.a.s.* (the so-called *soci accomandanti*) are liable for the partnership's obligations and debts within the limit of their capital contribution. Such a provision cannot be waived by the partners, since providing for the unlimited liability of limited partners would modify the basic principles of the legal model of *s.a.s.* and affect the internal relationships among the partners.[59]

The limited liability of *soci accomandanti* is strictly connected to the fact that pursuant to Article 2320 of the Italian Civil Code they are forbidden to manage the partnership, or to negotiate or close a deal on behalf of the partnership without having previously received a specific and limited power of attorney from the partnership. Such a prohibition has a key relevance under Italian partnership law. In this regard, Article 2320 of the Italian Civil Code provides that if a limited partner of an *s.a.s.* carries out management or acts on behalf of the company without a specific power of attorney, she or he becomes liable for all of the partnership's obligations. Further, he or she may be excluded from the partnership by the decision of the majority of partners.

According to the Italian Supreme Court's jurisprudence, the obligation not to manage the partnership is interpreted in strict terms.[60] Thus, the limited partner who breaches it, besides becoming liable for all of the partnership's obligations, whether they relate to the business act he or she carried out or not, becomes furthermore eligible to be declared bankrupt when the partnership has been declared bankrupt.[61] Further, despite being liable for partnership's obligations, the limited partner who carries out unlawful management acts does not acquire the right to conduct the business, which remains with the general partners.

Partnerships' and Partners' Insolvency

Under Italian Insolvency law,[62] an entrepreneur such as a partnership entity may be declared bankrupt only if it carries out a commercial activity (Article 1 of the Italian Insolvency Law). According to the general legal framework of Italian partnerships described above,[63] the only types of partnerships that are entitled to

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[59] Cassazione Civile [2003] 2481.
[60] According to Italian Supreme Court case law, the limited partner of *s.a.s.* is not allowed to (i) act on behalf of the partnership on the basis of a general power of attorney: Cassazione Civile [2010] 11973; Cassazione Civile [2008] 29794; (ii) negotiate any deals on behalf of the partnership: Cassazione Civile [1994] 4019; (iii) issue *omnibus* suretyship in favour of the partnership: Cassazione Civile [1998] 2854. Whereas, the limited partner is entitled for example to issue mortgages in favour of the partnership: Cassazione Civile [2014] 15600.
[61] See below on partnerships' and partners' insolvency.
[62] The Italian insolvency law (R.D. n. 267 dated 1942) is under reform since 2005-2006; a proposal of a complete new Insolvency Code has been issued in 2017 but it is not yet in force.
[63] See above on the types of partnerships under Italian law.

lawfully undertake commercial activities are the *s.n.c.* and the *s.a.s.,* and therefore they are, as a consequence, the only partnerships that can be declared bankrupt under Italian law.[64]

The bankruptcy of a partnership entails significant consequences for its partners. Pursuant to Article 147 of the Italian Insolvency Law, the decision that declares the insolvency of a *s.n.c.* or a *s.a.s.* automatically causes the bankruptcy of all its general partners, irrespective both of whether they are physical persons or legal entities, or whether they are personally insolvent.

The assets of the insolvent partnership and those of the insolvent partners are kept separated, even though a partnership's creditors also automatically participate in the distribution of the partners' personal assets.[65] Therefore, in order to better manage such distributions, Article 148 of the Italian Insolvency Law provides for the appointment of the same official receiver for both the partnership and the partners.

The partners' personal bankruptcy as a consequence of partnership's bankruptcy has been confirmed in the proposal of insolvency law reform that is under discussion in Italy (see Article 261 of the Proposal of Insolvency Code). This has been considered the best way to efficiently liquidate and distribute the partnerships' and the partners' assets in the interest of both the partnership's and the partners' creditors,[66] even though other recent reforms (such as German and Spanish) have considered the partners' personal bankruptcy not to be the best way to protect the creditors[67] and have opted for assigning the right to sue the partners in order to recover the partnership's unpaid debts to the official receiver.

The Extension of Bankruptcy of the Partnership to Former Partners

A disputed legal issue in this topic is whether a partner who no longer holds the status of partner may nonetheless be declared bankrupt as a result of the partnership's bankruptcy. This could have substantial impacts since it would include every partner who (i) has exercised an exit right; (ii) has died; (iii) has been excluded from the partnership; (iv) has transferred his interest in the partnership; (v) is a general partner who has become a limited partner; and (vi) was a general partner of a partnership that has merged or has been transformed in a company that has been declared bankrupt.[68] In the past, such a possibility has been strongly

[64] The *s.s.* on one side, and the *s.n.c* and the *s.a.s.* which do not carry out commercial activity, on the other side, are subject to a different procedure.
[65] On the other side, partners' personal creditors do not participate in the distribution of the partnership's assets.
[66] Alessandro Nigro and Daniele Vattermoli, *Diritto della Crisi delle Imprese* (4th ed., Il Mulino 2017) 321.
[67] See for further analysis Marco Speranzin, 'Nuovi Problemi in Tema di Responsabilità dell'Ex Socio di Società di Persone' [2015] 4 Rivista del Diritto Commerciale 629.
[68] Nigro and Vattermoli (n 66) 322 and following.

supported by Courts and scholars,[69] in light of the fact that the liability of the former partners should cover at least the obligations and debts that have arisen before the loss of the partner status, as provided by Article 2290 of the Italian Civil Code.

Since 2005, Article 147 of the Italian Insolvency Law has been amended in order to apply this concept. It provides for two requirements in order to extend the bankruptcy of the partnership to a former general partner. The first requirement is that the bankruptcy is declared within a year from the dissolution of the relationship of the partners with the partnership or from the termination of their unlimited liability, upon the condition that the third parties have been adequately informed of such events (usually by means of disclosure in the Business Register). The second is that the insolvency of the partnership depends, totally or partially, on obligations already in existence at the date of the dissolution or termination of the unlimited liability.[70]

If the former partner cannot be declared bankrupt anymore (after more than a year since he or she exited the partnership), the actions that the creditors or the receivers are entitled to undertake are still under discussion: the prevailing opinion is that the creditors should act individually.[71]

The Extension of Bankruptcy of the Partnership to Limited Partners of an S.A.S.

According to the most widely accepted opinion and Italian Supreme Court jurisprudence,[72] bankruptcy is extended not only to the general partners of a partnership that has entered bankruptcy, but also to any limited partner of a bankrupt *s.a.s.* who has breached the obligation not to manage the partnership or to negotiate or close deals on behalf of it. In this respect, it is argued[73] that there are no convincing reasons to distinguish the cases in which the partner held the status of general partner from the beginning from the cases in which he/she has assumed such a status later and because of his unlawful behaviour in breach of the strict provision of Article 2320 of the Italian Civil Code.

The Extension of Bankruptcy of the Partnership to Hidden General Partners

Italian Insolvency Law provides for another case in which it is possible to extend the bankruptcy of the partnership to its single partners based on the particular importance attached by Article 147 of the Italian Insolvency Law to the actual and real relationships among the partners. Firstly, it states that if the existence of further

[69] See for further references: Ruggero Vigo, 'Il Fallimento delle Società', in Giuseppe Ragusa Maggiore and Giuseppe Costa, *Le Procedure Concorsuali. Il Fallimento* (UTET 1997) 764 and following; Cassazione Civile [2003] 2481.
[70] Nigro and Vattermoli (n 66) 322 and following.
[71] Speranzin (n 67).
[72] Cassazione Civile [2010] 13468; Cassazione Civile [2014] 23651.
[73] See above on the limited partners' liability.

- i.e. hidden and *de facto* - general partners is verified after the declaration of bankruptcy of the partnership, the Court has the power to declare them bankrupt, upon the request of the official receiver, a creditor, or another partner.[74] Secondly, it states that the Court has the power to declare the bankruptcy of a hidden and *de facto* partnership as well as of its partners, even if the existence of such a partnership is verified only after the declaration of bankruptcy of an - apparently sole - entrepreneur. The most common opinion[75] deems it acceptable for the Courts to declare such kinds of bankruptcies without any limits of time, which means that the extension of bankruptcy towards the partners can be decided several years after the declaration of bankruptcy of the partnership or the single entrepreneur. The approach taken by the legislator with regard to the above-mentioned cases is therefore particularly strict and aimed at discouraging the participation of hidden and *de facto* partners in Italian partnerships, as well as the management of the partnership by third parties (who could be easily proven to be *de facto* partners).[76] This approach has been further developed by Italian case law with the theory of the so-called "*supersocietà di fatto*", which will be explained below.

The Extension of Bankruptcy to the so-called "Supersocietà di Fatto*"*

The possibilities to extend the bankruptcy of a partnership have recently gone even further. Three recent decisions of the Italian Supreme Court,[77] which have also recently been examined and substantially approved by the Italian Constitutional Court,[78] have pushed the interpretation of Article 147 of the Italian Insolvency Law (discussed above) to such an extent that it is deemed possible to declare the bankruptcy of hidden partners, whether they are legal entities or natural persons, even though the original bankrupt entity is a private company and the hidden partners are considered its shareholders (usually other legal entities) or its managers. In order to achieve such an extension of bankruptcy it is sufficient to prove, also by means of presumptions, that a hidden and *de facto* partnership had existed between the private company and its hidden partners (the so-called *super-società di fatto*), and therefore that the business activity was accountable to such a hidden partnership, which is declared insolvent together, as an extension, with its partners (the private company, its shareholders or managers). Such an interpretation aims at increasing the protection of (company) creditors during insolvency situations. [79] Scholars however consider this case law not acceptable from a systematic point of view (Italian law provides for a set of rules as to the liability of the parent company in the group of business associations: see Article

[74] Common evidences of such hidden and *de facto* partners are partnership's financing; participation to business; guarantees given by third parties in the interest of the partnership.
[75] Nigro and Vattermoli (n 66) 323.
[76] See Campobasso (n 9) 59 and following.
[77] Cassazione Civile [2016] 1095; Cassazione Civile [2016] 10507; Cassazione Civile [2016] 12120.
[78] See Corte Costituzionale [2017] 255.
[79] To this extent, Italian case law developments are similar to the ones made by the German Federal Supreme Court to protect company creditors: see Giuseppe B Portale, *Lezioni Pisane di Diritto Commerciale* (Pisa University Press 2014) 49 and following.

2497 and following of the Italian Civil Code), [80] and as having possible adverse effects on legal certainty,[81] in addition to creating conflict among different groups of creditors (on one hand, private company's creditors and, on the other hand, the hidden partnership's and partners' creditors).

Voluntary Arrangements

According to Article 160 of the Italian Insolvency Law, an *s.n.c.* or an *s.a.s*. that is close to insolvency, may choose to apply for a voluntary arrangement. However, such voluntary arrangements only bind the partnership and its creditors, even though there may be significant consequences for the level of liability for individual partners as it may function to reduce the partnerships' debts overall (the so-called *esdebitazione*), as provided by Article 184 of the Italian Insolvency Law. Full partners' liability remains in force for all personal debts not resulting from the partnership's business obligations; therefore, the personal creditors could still attack the partners' personal assets.

The most discussed problem in recent Supreme Court cases concerns the effects of the partnership's voluntary arrangements on the guarantees given by partners on behalf of the partnership. The first decision, dated 1989,[82] declared that the effects provided by Article 184 of the Italian Insolvency Law (*esdebitazione*) apply also to partners' personal guarantees. In other words, in order to provide a real *par condicio creditorum* (equal effects on all creditors), the reduction of the partnership's debts connected with the voluntary arrangements extends also to suretyships and performance bonds personally given by the partners on behalf of the partnership.

However, a second and recent decision, dated 2015,[83] stated that a mortgage on a partner's own real estate is not subject to the effects of Article 184 of the Italian Insolvency Law and that such a creditor is entitled to full repayment. The purpose of such a decision is probably to foster the financing of partnerships; however, it could be a strong point in favour of adjusting creditors (and banks first), which are usually able to obtain personal guarantees by the partners and for such a reason are not particularly concerned by the success of the voluntary arrangement.[84]

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[80] Therefore there is no need to extend the insolvency to such hidden partners if general business law already provides the legal instruments in order to protect creditors: see Paolo Ghionni Crivelli Visconti, 'Società Eterodirette e Selezione dei Soggetti Fallibili: la c.d. Supersocietà tra Società di Capitali' (2017) 115(1) Rivista del Diritto Commerciale 147; Fabrizio Guerrera, 'Considerazioni Sistematiche sulla c.d. Supersocietà di Fatto' [2017] 4 Riv Dir Soc 975 and following.

[81] It is quite difficult to ascertain which assets were derived from the hidden partnership, and which are the true partner' contributions.

[82] Cassazione Civile Sezioni Unite [1989] 2892.

[83] Cassazione Civile Sezioni Unite [2015] 3022.

[84] See for references Speranzin (n 3) 312.

The proposal for an insolvency law reform provides that the solution chosen by the Supreme Court in the 2015 decision (i.e. the voluntary arrangement has no effect on the guarantees personally given by the partners) should be extended to all forms of guarantees (suretyships as well: see Article 122 of the Proposal of Insolvency Code).

The Procedures Provided for Partnerships that cannot be Declared Bankrupt and for Single Partners

As mentioned above,[85] *società semplici* cannot be declared bankrupt, since, under Italian partnership law, they are not allowed to carry out any commercial activity.[86] The legal vacuum of an insolvency procedure has been filled by a recent reform of Italian partnership insolvency law.[87] According to Legge n. 3/2012, an *s.s.* and its insolvent (or close to insolvency) single partners, or over-indebted entrepreneurs, are eligible to stipulate a voluntary arrangement with creditors, in order to be allowed a fresh-start or to establish a new business activity, or they may file for a liquidation procedure if they are not able to make any material offer to the creditors. According to the most widely shared opinion, this voluntary arrangement under Legge n. 3/2012 can be chosen also by single partners of a *s.n.c.* or *s.a.s.* if the partnership (and its partners as a consequence) has not already been declared bankrupt.[88]

Conclusion: The Future of Partnerships under Italian Law

In the light of the current Italian legal framework of partnership law described above, it is possible to draw some conclusions and main points.

Firstly, Italian partnership law is still important as a general business law and as a default model for businesses, even if registered partnerships are decreasing and private companies are increasing. Many basic Italian business principles are still provided by partnership law and extended to company law. [89]

Secondly, a further development in the importance of partnership law could be achieved if Italian practice used partnership law, and in particular limited partnerships, as investment vehicles, as utilised in other jurisdictions in the last years (US-UK-Germany), or in order to carry out a family business, mostly when

[85] See above on partnerships' and partners' insolvency.
[86] See above on the types of partnerships under Italian law.
[87] Legge 27th January 2012, n. 3.
[88] As decided by Tribunale di Pistoia [19th November 2014]; Tribunale di Prato [16th November 2016] with regard to a winding up procedure; in the opposite direction: Tribunale of Milano [18th August 2016]. See further Nigro and Vattermoli (n 66) 583. This legal problem will probably be resolved in the first sense by the new Insolvency Code, which allows single partners to file for a voluntary arrangement
[89] See recently Cassazione Civile [17498] 2018 with reference to the importance of a contribution in business law and the prohibition of *societas leonina*.

a private company could be appointed as a general partner of an *s.a.s.* [90]. Probably the main problem is that neither case law nor legislation has yet developed a white list of limited partners' acts (activities that can be undertaken by limited partners), and the Italian Supreme Court is, as we have seen, rather strict on this issue.

Thirdly, Italian case law has developed some specific and strict rules to extend the liability in an insolvency situation: *de facto* partners and hidden partnerships (also among companies: so called *supersocietà di fatto*) have been used as a strong instrument for creditor protection. However, the theory underlying this legal development could be, as already mentioned, easily challenged, [91] and, in the opinion of the author, the need of legal certainty should prevail over it, considering that the Italian Civil Code provides for other remedies (i.e. rules and liabilities of company groups), which are better tailored to the need to protect creditors.

Finally, and in connection to the above discussion, it should be mentioned that the introduction of a limited liability partnership model under Italian law has recently been discussed;[92] however, some scholars argue that unlimited liability should be maintained as the general rule for business, even if the rise of private companies with minimum legal capital and maximum freedom of contract could challenge such a conclusion.[93]

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[90] See above on the types of partnerships under Italian law.
[91] See above on partnerships' and partners' insolvency, in particular the extension of bankruptcy to the so-called "supersocietà di fatto".
[92] See for references Speranzin (n 3), 327.
[93] See Portale (n 79) 54 and following, who explains the actual importance of the legal capital system as a mean of creditors' protection.