

## Partnerships

### Chapter 2: Tri-Level Existence of the Partnership

Tri-level existence of partnership:

1. *Primarily*, as a Contractual Relationship between and among the parties
2. A Medium of Doing Business through a Separate Juridical Personality as the basis of creating multi-levelled contractual relations among various parties
3. A Business Enterprise, a business venture, or what has been termed as “a going concern”

#### Contractual Relationship

- The contract of partnership is one where two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing profits among themselves (art. 1767).
- Thus, the Law on Partnerships must balance between the principles governing the relationship of the partners among themselves as contractual parties *with* their rights and obligations with respect to the business venture.
- A contract of partnership is **consensual**: A partnership may be constituted in any form, except where immovable property or real rights are contributed thereto (art. 1771).
  - Thus, there must be a meeting of the minds to constitute a partnership.

#### Separate Juridical Personality

- Legal basis: A partnership has a juridical personality separate and distinct from that of each partners, even in case of failure to comply with the registration requirements of art. 1772 (art. 1768).
- Thus, the partnership must answer for and suffer the consequence of its acts as such entity capable of being the subject of rights and obligations.
- As a result, the Piercing the Veil doctrine applies. However, it is *less* applicable because the partners have unlimited liability anyway.
  - But when the juridical personality is but a means to evade the law or a sham, the courts will pierce the veil to hold the partners directly liable for the consequences.
- The partners cannot be held liable for the obligations of the partnership, unless it is shown that the legal fiction of a different juridical personality is being used for fraudulent, unfair or illegal purposes (*Aguila v. CA*).
  - Hence, it is the partnership—not its officers or agents—which should be impleaded in any litigation involving property registered in its name.
- Consequently, a partnership is entitled to all constitutional rights and protections.
  - Except: The right against self-incrimination (*Bataan Shipyard v. PCGG*)

#### Partnership as a Business Enterprise

- It is only from the partnership business enterprise level that we can fully appreciate the concept that partners are “owners” of the business, or that they take the position of “equity holders,” as distinguished from creditors who advance money to the partnership as “debt holders” (see art. 1770).
- In fact, in *Lim v. Lim*, the court defined the partnership in terms of being essentially a contract to pursue a business enterprise: A partnership exists when two or more persons agree to place their money, effects, labor, and skill in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them.

### Chapter 3: Essential Attributes of the Partnership

Essential attributes of a partnership:

1. Informal or consensual juridical personality
2. Mutual agency
3. Delectus personae
4. Partners burdened with unlimited liability (except for LLP)

#### Non-Solemn or Consensual Juridical Personality

- It is implied from arts. 1767 and 1768 that the existence of a separate juridical personality for a partnership is conditioned on the perfection and validity of a contract of partnership; the separate juridical personality arises *ipso jure* upon the perfection of a contract of partnership.
- It follows, then, that the constitution of a partnership juridical personality would also be consensual (remember in art. 1771 that a partnership may be constituted in any form).
- This is further bolstered by the fact that if a partnership is continued beyond the fixed term it had, such juridical personality can be extended beyond the original fixed term by the mere continuation of the business, without any settlement or liquidation.
  - Thus, the partnership is not terminated, and this is prima facie evidence of continuation of the partnership (art. 1785).

*Exceptions to the consensual nature of partnership juridical personality (i.e., it becomes solemn)*

1. Every contract of partnership having a capital of P3,000 or more shall appear in a public instrument and recorded with the SEC (art. 1772)
2. Where immovable/real rights are contributed:
  - a. In which case a public instrument shall be necessary
  - b. The contract of partnership is **void**, if an inventory of said property is not made, signed by the parties and attached to the public instrument (arts. 1771, 1773)
3. A limited partnership must be registered with the SEC (arts. 1843, 1844)

#### Mutual Agency

- Mutual agency lies at the heart of the partnership arrangement because it defines the prerogative of every partner to participate in the management of the partnership business.
- Thus, the default rule is that each of the partners is an agent of the partnership and all the other partners in pursuit of the partnership affairs (art. 1803[1]).
  - Thus, when the manner of management has *not* been agreed upon, all the partners are considered agents and whatever any one of them may do alone shall bind the partnership.
- Exceptions (not binding):
  - The partner so acting has in fact no authority to act for the partnership and the third person knows this fact that the partner has no authority
  - The partner acts which are not apparently for the carrying on of a business of the partnership “in the usual way” (art. 1818)
- Unanimous consent is required to:
  - Assign the partnership property in trust for creditors or on the assignee’s promise to pay the debts of the partnership
  - Dispose of the goodwill of the business
  - Do any other act which would make it impossible to carry on the ordinary business of a partnership
  - Confess a judgment
  - Enter into a compromise concerning a partnership claim or liability
  - Submit a partnership claim or liability to arbitration

- Renounce a claim of the partnership

### Delectus Personae

- The contract of partnership creates the most personal relationship between and among the partners which when broken **also breaks the bond of partnership**.
- Two views:
  - It is embodied in the **principle of relativity/privity of contracts** – The privity that is created by its perfection is between and among the partners thereto; such privity cannot be extended beyond the original partners without the consent of all the other parties to the contract.
  - The relationship established in a contract of partnership is one of **fiduciary character** – Once the trust or confidence is lost, the contract is deemed breached or at least at an end.
- Thus, even when the articles of partnership provide for a definite term of existence, a partnership can be **dissolved midstream by the express will of any partner who must act in good faith** (art. 1830).
  - If he acts in bad faith, the partnership will still be dissolved, **but the partner in bad faith will be liable for damages** (*Ortega v. CA*; *Tocao v. CA*).

### Unlimited Liability

- **All partners—including industrial ones—shall be liable pro rata with all their property and after all the partnership assets have been exhausted. Any stipulation against such liability shall be void, except as among partners (art. 1816, 1817).**
  - These provisions only come into play during the dissolution and winding up!
- It is the owner or equity holder of the business enterprise, and not the creditors, who must stand ready to absorb the losses of the business enterprise.
  - To hold otherwise would mean that the partnership creditors take the risks and consequences of the losses of the partnership enterprise when they (creditors) draw no benefit from its profits.

## Chapter 4: The Contract of Partnership

### Elements:

1. **Consent** – The meeting of minds between two or more persons to form a partnership, i.e., to pursue jointly a business enterprise, or to jointly exercise a profession
2. **Subject matter** – The creation of a common fund, or more specifically, to undertake a business venture with the intention of dividing the profits among themselves
3. **Consideration** – The contribution of cash, property or service to the business venture, with the intention to derive profits.

### Consent

- No person can find himself a partner in a partnership unless he previously consented to be in such a contractual relationship (art. 1769 [1]).
- The essence of every partnership agreement is the consent of each of the partners to be associated in a business venture (*Ortega v. CA*).
- Consequently, parties must **have legal capacity to contract**.
  - In art. 1782, persons who cannot donate to each other cannot enter into a universal partnership.

- Under art. 87 of the Family Code, a married woman may enter into a contract of partnership, but the husband may object thereto.
- **Delectus personae** – No person shall be admitted into a partnership, or become a party to a partnership agreement, without consent of all the partners (art. 1804).

#### *Subject matter*

- The agreement to share profits and losses from the business venture is the hallmark of a partnership arrangement.
- Implied in art. 1767 is that the essence of the agreement among the partners is to become equity-holders in a business enterprise, because their consent must be the creation of a common fund, with the intention of dividing the profits among themselves.
- *Contra* art. 1769: The essence of the position of an equity holder is to participate in the profits of the business, and consequently, he ought to be ready to absorb the losses that may be sustained thereby.
  - A person who receives gross returns is not a partner, because he does not share in the losses. Consequently, he is not an equity holder.
  - Thus, there is *no* partnership when an investor does not entitle him to participate in the running of the business or the provision of mutual agency (*Santiago v. Sps. Garcia*).
- **Co-ownership or co-possession does not necessarily constitute a partnership.**
  - Thus, there is no partnership if the original intention was merely to collectively buy lots and eventually partition them among themselves. The division of profits was **merely incidental** to the dissolution of the co-ownership which was a temporary state (*Orbillos v. CA*).
- **Receipt by person of a share of the net profit**
  - Under art. 1769(4), receipt by a person of net profits is *prima facie* evidence that he is a partner, but no such presumption exists in the following scenarios (**these are not equity**):
    - As installment payments of a debt and/or interest thereof
    - As wages of an employee
    - As rentals paid to a landlord
    - As annuity to a widow or representative of a deceased partner
    - As consideration of sale of goodwill or other property
  - Doctrine: When a person is entitled to share in the “profits” of the business venture and such right is based on some other contractual relationship not borne out of equity or proprietary interests (*see enumeration*), **he is not deemed to be a partner**.
    - In other words, the contract to share in the profits and losses of a business venture must always be based on the **assumption of** equity interest in the business enterprise upon which the contract of partnership shall arise.
- **Meeting of minds on establishing a common fund is the essence of a partnership contract**
  - What brings about a contract of partnership is an agreement to constitute a common fund with the intention of dividing the profits and losses; **outside of these essential elements, a partnership does not arise**.
  - Another essence of partnership is that the partners bind themselves under a contractual arrangement to be joint owners and managers of a business enterprise. Art. 1770 implies the equity or proprietorship position of the partners.
- **Doctrine of exercise of the prerogatives of a proprietor (?)**
  - CLV: Should be viewed as merely collaborative evidence of the partnership relationship between the parties in a business venture. Still, the existence of partnership must be located in the meeting of the minds to constitute a common fund and to divide the profits thereof among themselves.
    - Because a business enterprise can simply appoint a manager or agent to exercise acts of management, without being owners or partners of the business venture.
  - Badges that would normally accompany a partnership relationship:

- Written agreement to prove partnership
- Contribution of money, property or industry for the purpose of engaging in the business
- Proof of active participation in the management, administration, and policy-making of the business (*Sy v. CA*).

#### *Cause or consideration*

- The cause or consideration for each partner is the undertaking of the others to contribute money, property, or industry to a common fund.
- This is exemplified in the following provisions:
  - Art. 1786 – every partner to be a debtor of the partnership for whatever he may have promised to contribute
  - Art. 1787 – partner is liable for interest and damages for failing to contribute the sum he was bound to pay under the AIP
  - Art. 1790 – presumption of obligation to contribute equal shares
  - Art. 1830 (4) – decrees the dissolution of a partnership when the specific thing which a partner had promised to contribute to the partnership perishes before the delivery

#### *Additional elements (US jurisprudence)*

1. Purpose to engage in a business enterprise
  - a. Except: Professional partnerships
2. Joint control
  - a. Exemplified in arts. 1810 and 1818 (mutual agency).

#### **Essential characteristics of the partnership contract**

1. Nominate and principal
2. Consensual
  - a. Thus, when the partner reneges on his promised contribution, the partnership still arises. Failure to deliver the promised contribution **does not make the contract void, but merely gives a ground for dissolution.**
  - b. Thus, an oral contract of partnership is as good as a written one.
3. Onerous and bilateral
4. Preparatory and progressive

### **Chapter 5: Formal requirements for partnerships**

**General rule:** Partnerships are essentially consensual in character (arts. 1771, 1784)

#### **Requirements tied to capital contribution**

1. When capital contributions total P3,000 or more:
  - a. AIP must appear in a public instrument
  - b. AIP must be registered with SEC
    - i. Failure to comply with this formality does not render the contract void, but only affects the manner of registration and affords to the parties affected the remedy of demanding that it be executed in a public document (art. 1357). **This is to allow a partner in an oral partnership to have a cause of action.**
    - ii. **Failure to comply shall not make the partnership void. It shall not affect the liability of the partnership and the members thereof to third persons.**

- iii. *De facto partnership* – A partnership arrangement not covered by duly registered AIP
  - iv. *De jure partnership* – A partnership which complied with the formalities and registration requirements under art. 1772.
  - v. **Practical purpose:** Compliance with the formalities shall serve to bind the partners as to their contractual intent, thus preventing the provisions of the Civil Code from applying (*Rojas v. Maglana*).
- 2. Where immovable property contributed
  - a. Pertinently, art. 1773 talks about immovables “contributed.” Thus, when the partnership bought the immovable, art. 1773 is inapplicable (*Agad v. Mabato*).
  - b. The formalities under art. 1773 are **meant for the protection of the partnership creditors. The declaration that the partnership is “void” does not affect the intra-partnership relationship between and among the parties and between the partners and the partnership itself. But it will be considered void if it is necessary to protect their (creditors) interests.**
    - i. From an intra-partnership POV, there are **no dire consequences** that befall the partners and the partnership for failing to comply with art. 1773. It is still an ordinary contract, if *not a contract of partnership* (*Torres v. CA*).
  - c. CLV: The doctrine that the partnership is void for failure to comply with art. 1773 applies only to situations where the claimant does not have proper evidence to prove that indeed a contract of partnership has been constituted (*Litonjua v. Litonjua; mere obiter*).

#### **Requirements tied to partnership name (art. 1815)**

- The mere inclusion by a nonpartner’s name in the partnership name would make him liable to partnership debts, even when under the AIP he is not listed formally as one of the partners.
  - CLV: This implies that the public is not bound by the AIP, even when it is SEC registered.
  - Partners cannot avoid the consequences of a partnership contract entered into by invoking in their defense the anomaly in the firm name which they themselves adopted.
  - This was meant to protect the public from imposition and fraud; for the protection of creditors.
- Effect: The legal requirement as to firm name must be construed as rendering contracts made in violation thereof unlawful and unenforceable, *only as between the partners and at the instance of the violating party, but not in prejudicing innocent third parties*.
- To prevent a partnership from recovering on the contracts entered on the ground that there was no valid registration or did not comply with the rule on firm name would constitute unjust enrichment. Thus, the **principle of corporation by estoppel doctrine applies to unregistered partnerships:**
  - Persons who assume to form a corporation and enter into business with third persons are *estopped* from denying that they constitute a corporation. The shareholder is prohibited from denying the existence or the legal validity of such corporation. Parties must take the consequences of the position they assume (*Compañia Agricola v. Reyes*).

#### **Registration of little usefulness in Partnership Law**

- The essence of what constitutes a partnership contract is split into two levels:
  - As between and among the partners
    - It is the *point of perfection* of the contract
  - In relation to third parties who deal with a business enterprise
    - *When a contract is entered into with a third party under the representation that such third party is dealing with a partnership/partner*
- **When no third party is involved, neither the partnership nor any of the partners can invoke the failure to comply with the formalities.**
- Dealings with third parties, two important areas of consideration:

- The validity and enforceability of contracts entered into with a purported partner of an existing/not legally constituted partnership
  - The standing of partnership creditors to enforce partnership liability *personally* against the partners
- General rule: A member of the public who deals in good faith with a purported partner in the ordinary course of business has a right to expect that his contract is valid and enforceable. *Intra-partnership and technical issues cannot be raised against the third party.*
  - Third parties who deal with the partnership are not bound by the registered AIP, unless they have actual knowledge thereof.
  - Thus, by virtue of *mutual agency*, the public is not mandated to ascertain whether a partner is authorized to bind the partners, and in the absence of clear indications to the contrary, every partner is deemed to have full authority to act on behalf of the partnership and to bind other parties.
- In the end, a contract of partnership or articles of partnership is merely the **best evidence of the partnership itself**.

## Chapter 6: Classes of partnerships and partners

### As to the object of the partnership:

1. Universal
  - a. A contract of partnership which encompasses either all the present properties of the partners or to all of the profits (art. 1777). This means that the property which belong to each of the partners at the time of the constitution of the partnership becomes the common property of all the partners (art. 1779).
2. Particular
  - a. One that has for its object:
    - i. determinate things,
    - ii. their use or fruits,
    - iii. a specific undertaking, or
    - iv. the exercise of a profession or vocation.

### Importance of knowing the difference:

1. There are certain persons disqualified from entering a universal partnership.
  - a. Example: Persons who are disqualified from donating to one another (spouses [art. 187, Family Code])
2. The rights and obligations that may arise would be determined on whether they are bound under a universal or particular partnership
  - a. *Lyons v. Rosenstock*: A universal partnership is never presumed. The default rule is a particular partnership.

### As to duration

1. Partnership with a fixed term – Terminates upon the expiration of the term
2. Partnership for a particular undertaking – Terminates upon the achievement of the undertaking
3. Partnership at will – Indefinite term; dissolves only when an act or cause of dissolution arises
  - a. But see: If nos. 1 and 2 are continued despite the deadline, it **becomes a partnership at will**.

### As to extent of partners' liabilities

1. General partnership
2. Limited partnership

### Liability of general partners

- The liability of general partners (in a general partnership as so opposed to a limited partnership) is laid down in Article 1816:
  - a. All partners shall be liable pro rata beyond the partnership assets for all the contracts which may have been entered into in its name, under its signature, and by a person authorized to act for the partnership.
  - b. This rule is to be construed along with other provisions of the Civil Code which postulate that the partners can be held *solidarily* liable with the partnership specifically in these instances
    - i. where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act;
    - ii. where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
    - iii. where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership— consistently with the rules on the nature of civil liability in delicts and quasi-delicts (J. Vitug, concurring opinion in *Lim Tong Lim v. Philippine Fishing*).

#### Kinds of partners

1. Capitalist partner
2. Industrial partner

	Capitalist partner	Industrial partner
Contribution	Contributes money and/or property	Contributes only his industry or service
Liability for losses	Liable for partnership losses; any stipulation exempting them from losses is void	Not liable
Ability to engage in other business	Cannot engage in a business <b>that competes</b> with the partnership	Cannot engage in <b>any other business at all</b> , competing or not, during the partnership
Obligation to make additional contributions	Required to make <b>additional contributions</b> in case of imminent loss of partnership business	<b>No obligation</b> to make additional contributions

### Chapter 7: Rights, powers and authority of partners

#### Property rights of every partner (art. 1810)

1. Management power – The right to participate in the management of the partnership (manager)
2. Co-ownership power – The right in specific partnership property (agent)
3. Equity interest – The right to profits (and share the losses) of the partnership business enterprise (investor)

#### Two considerations:

1. The Law on Partnership characterizes the contract of partnership as **one of the highest fiduciary and personal level** (delectus personae)
2. It treats each of the property rights of partners under art. 1810 to ensure that those rights that pertain to agency and personal relations are not affected by dealings on those which are strictly proprietary in nature



**Partner's right to manage the partnership** (arts. 1803, 1820, 1821, 1822, 1823, 1824)

- a. Default rule: Every partner has a right to manage (art. 1818).
  - a. Embedded in art. 1818 is the **doctrine of apparent authority** which allows a third party dealing with a juridical entity to rely upon the validity and enforceability of contracts entered into with an officer/representative who has been by practice endowed with apparent authority to act for the juridical person (e.g., the partnership).
  - b. This **right to manage** is affirmed:
    - i. Art. 1820 – an admission/representation made by any partner concerning partnership affairs *within* the scope of his authority is *evidence against the partnership*
    - ii. Art. 1821 – notice to any partner of any matter relating to partnership affairs operate as notice or knowledge of the partnership (notice to partner = notice to partnership)
    - iii. Art. 1822 – tort committed to third party by a partner makes the partnership liable
    - iv. Art. 1823 – partnership is liable for the loss caused by the misapplication by a partner acting within the scope of his apparent authority
      - 1. N.B. For arts. 1822 and 1824, the partnership and partners are **solidarily liable** for the tort of damages.
  - c. Special management arrangements—even so when formalized in the AIP—are not binding or prejudicial to third parties, who do not know such special arrangement.
  - d. Parties dealing with a partnership are deemed to have a right to expect that their dealings with the partner should bind the partnership.
- b. Transactions not in the ordinary course of partnership business (art. 1818) – The doctrine of apparent authority does not apply in:
  - a. Assigning of partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership
  - b. Disposition of the goodwill of the business
  - c. Do any other act which would make it impossible to carry on the ordinary business of a partnership
  - d. Confession of a judgment
  - e. Entering into a compromise agreement or submitting to arbitration a partnership claim or liability
  - f. Renouncing a partnership claim
    - i. These are all **acts of strict ownership or alteration**.
- c. Specific modifications on the power of management (arts. 1800-1802)
  - a. The partners may appoint a manager (managing partner).
    - i. The managing partner may execute all **acts of administration** *despite the opposition of his partners and his powers are irrevocable except for just/lawful cause*.
    - ii. **But** if the managing partner is appointed **outside the AIP**, the designation is *revocable*.
  - b. Rules when there are multiple managing partners:
    - i. Each one may separately execute all acts of administration.
    - ii. If one managing partner opposes, the majority of the managing partners' decision prevails.
      - 1. If tie → question will be decided by the financial majority.
  - c. If the partners stipulated that there must be UC among the managing partners, there must be UC to give validity for the acts. This cannot be waived, except for imminent danger of grave or irreparable injury to the partnership (art. 1802).
- d. Specific rules on dealings with immovable properties of the partnership
  - a. As a general rule, no partner may make any important alteration in the immovable property of the partnership, without the consent of others (art. 1803).

- b. Specific rules on how partners may bind real properties pertaining to the partnership (art. 1819)

Situation or case	Rule
Title to real property is in the partnership name; partner conveys title in the partnership name	Partner may convey title, but partnership may recover the property unless: (a) the act binds the partnership under art. 1818, par. 1; or (b) the property has been conveyed to a holder for value without knowledge of lack of authority
Title is in the partnership name; partner conveys in his own name	Conveys only the equitable interest of the partnership, provided the act is within the partner's authority under art. 1818, par. 1
Title is in the name of one or more but not all partner; record does not disclose partnership rights	Those in whose name the title stands may convey the property, but the partnership may recover it if the act does not bind the partnership under art. 1818, par. 1, unless purchaser/assignee is a holder for value without knowledge
Title is in the name of one or more or all partner, or in a third person in trust for the partnership; partner conveys in partnership name of his own name	Conveys the equitable interest of the partnership, provided the act is within the partner's authority under art. 1818, par. 1
Title is in the name of all the partners; all partners execute the conveyance	Conveys all rights of the partners in the property

#### **Partner's right to specific partnership property** (art. 1811)

- A partner is a co-owner with his partners of specific partnership property (implementation of mutual agency), thus:
  - A partner has an equal right with his partners to possess specific partnership property for partnership purposes
  - A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property
  - A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership
  - A partner's right in specific partnership property is not subject to legal support
- Partners' contributed property to the partnership can be dealt with only for partnership purposes
  - When a specific property has been contributed by a partner, once contributed, it no longer is subject to the sole will and discretion of the contributing partner *who ceases to be the sole owner thereof*.
    - Thus, the contributing owner could no longer dispose of said property without the consent of the partnership or of the other parties (*Clemente v. Galvan*).
    - Essentially, it becomes property of the partnership (*Lozana v. Depakakibo*)!

#### **Equity rights of partners** (arts. 1812-1814)

- Partner's interest – His equity interest or his share of the profits and surplus.
  - A partner's interest in the partnership defines his equity position as a co-proprietor of the partnership enterprise, which entitles him *ipso facto* to share in the profits and losses of the business venture.

#### *Assignment of a partner's equity right*

- Generally, a partner's equity is transferable or assignable but said assignment **does not make him** a partner (art. 1813).
  - Thus, the only thing that may be conveyed by a partner is the **right to receive profits, and surplus assets upon dissolution of the partnership**.

- Exception: The assignee may avail himself of the “usual remedies” available to a partner only in case of fraud in the management of the partnership.
- Partnership creditors have preference over the *personal* creditors of the partners with regard to the partnership property.
  - Remedy of a creditor: To apply to the courts to charge the partner’s equity interests for the payment from his share in the profits or any other money due from the partnership. Such interest charges may be redeemed at any time *before* foreclosure by the other partners or by the partnership itself.
- Still, the partners may agree that one of them cannot sell or assign his interest without the consent of others, or they may enter into an agreement prohibiting assignment altogether (by stipulation).

*Right to participate in the profits and obligation to share in the loss (arts. 1797-1799)*

- A stipulation which excludes one or more partners from any share in the profits or losses is **void**, but the partnership arrangement remains subsisting (art. 1797).
  - Thus, a stipulation guaranteeing to a partner receipt of profits would be contrary to public policy, because it would except the partner from participating in the loss (*Moran Jr. v. CA*).
- **Rules under art. 1797:**
  - Profits and losses shall be distributed in conformity with the agreement between the parties (stipulation)
  - If only the share of each partner in the profits has been agreed upon, the share of each in the losses shall be in the *same proportion*
  - In the absence of an agreement, the share of each partner in the profits and losses shall be in proportion to what he may have contributed
  - Except that the industrial partner:
    - Shall *not* be liable for the losses
    - As to the profits, he shall receive such share as may be just and equitable under the circumstances
    - If he contributed capital, he shall also receive a share in the profits in proportion to his capital
- The designation of losses and profits cannot be entrusted to one of the partners (art. 1798).
- When does the right to profits accrue? Only when there has been a proper accounting or liquidation of the income and expenses pertaining to the business (outside, of course, of dissolution).
  - Thus, the receipt by a partner of his partnership contribution, there being no indication of termination or withdrawal, *does not extinguish his right* to an accounting, because his remaining interest in the partnership can only be determined upon final liquidation (*Fernandez v. Dela Rosa*).
  - Thus, when accounting had been made and the partner received such accounting without objections, including the receipt of their share of the profits, he is no longer entitled to demand further liquidation, unless there is fraud, deceit, error or mistake.

Other rights of a partner

1. Right to be reimbursed for expenses incurred on behalf of the partnership (art. 1796)
  - a. Thus, a partner has a right to demand from the partnership reimbursement of advances made on behalf of the business
2. Right to inspect (art. 1805)
3. Right to demand true and full information (art. 1806)
4. Right to demand accounting (art. 1807, 1809)
  - a. The right to demand accounting exists as long as the partnership exists.
5. Right to dissolve the partnership
  - a. The near-absolute power of any partner to demand the dissolution of the partnership is in consonance with the doctrine of *delectus personae*.

### Obligations of the partnership to third parties (arts. 1796, 1815, 1818)

1. Liability arising from firm name (art. 1815)
2. Liability arising from the acts of the agent (art. 1818)
  - a. The liability that the partnership bears from acts of the partners in pursuance of its business applies only to a third person who deals in *good faith* with the partnership.
  - b. A third person *who knows of the lack of authority has no claim against the partnership*.

## Chapter 8: Duties and obligations of partners

### Obligation to contribute to the common fund (arts. 1786, 1790)

- The promise or obligation to contribute to the common fund is of the essence of the contract of partnership and binds the partners to one another. The breach of which would break the contractual bond (*delectus personae*).
  - Thus, every partner is a debtor of the partnership for whatever he may have promised to contribute thereto (art. 1786).
- The remedies available to the partnership and the other partners with respect to the failure/refusal to comply with contribution obligation **takes the normal remedies of interest and damages**, *including his shares of profits* that were not realized but which clearly could have been earned for the company.
- **When a partner fails to comply with his obligation to deliver what he promised to contribute to the partnership and there is no desire to dissolve the partnership, the remedy is specific performance and not resolution.**

*When promised contribution is a sum of money*

- **Art. 1788** allows the partners and the partnership to recover from the defaulting partner not only the interest but also damages, including loss opportunity, shown to have been sustained by the partnership by reason of the failure of the partner to pay his contribution.

*When promised contribution is property*

- Under art. 1786, when a partner binds himself to contribute a *specific or determinate thing* to the partnership, he assumes the position of *being a seller of a determinate property* such that he is liable for:
  - A breach of the warranty against eviction
  - The fruits from the time he was obliged to deliver the determinate thing, and without need of demand
- As to who bears the risk of loss of determinate things promised to be contributed but *prior* to actual delivery, it would be the partner who retains ownership.
- In any case, when a specific thing which a partner had promised to contribute to the partnership perishes before the deliver dissolves the partnership (art. 1829 [4]).
- Moreover, under art. 1795 lays the rules on the risk of specific and determinate things contributed to the partnership.

Thing	Who bears risk
Not fungible, such that their use and fruits may be borne for the common benefit	Borne by the partner who owns them
Fungible, cannot be kept without deteriorating, or if they were contributed to be sold	Borne by the partnership
No stipulation	Borne by the partnership, but be limited to the value at which they were appraised

#### *When contribution in goods*

- Under art. 1877, when the contribution is in goods, their appraisal must be made in the manner prescribed in the contract, and in the absence of stipulation, made by experts chosen by the partners and according to current prices.

#### *When contribution in real property*

- Contributions of real property have solemnities under art. 1773.

#### *Contribution of industry; the **industrial partner***

- The obligation/contribution of the industrial partner cannot be compelled by specific performance, for it is an obligation *to do*
- **When the industrial partner failed to render the proper service, he can be made liable for the damages** sustained by the partnership for such nonfeasance.

#### *Remedies when there is default in obligation to contribute*

- Rescission is not allowed.
- Thus, **the proper remedies would be to seek a collection of the promised contribution**, with recovery of interests and damages as provided for in arts. 1786 and 1788, or **seek the dissolution of the partnership** under art. 1831.

#### *Obligation for additional contribution*

- **General rule:** There is *no* obligation to contribute more than what was originally stipulated in the AIP, unless there is a stipulation providing for additional contributions.
- **But see** art. 1791: Additional contribution becomes *necessary* in cases of an imminent loss of the business of the partnership.
  - *If the partner refuses to contribute* → He shall be obliged to sell his interest to the other partners (except for industrial partner).

#### **Doctrine of unlimited liability**

- Unlimited liability of existing partners (art. 1816) is triggered by the exhaustion of partnership assets to answer for partnership liabilities.
- The *pro rata* obligation does not mean proportionate liability, but means the partners are **jointly liable** (per head, equally divided).
- Any stipulation against the liability shall be void, except as among the partners (art. 1817).

#### *Obligation of subsequently admitted partners*

- Under art. 1826, a person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising *before* his admission.
  - Except: This liability shall be satisfied only out of the partnership property, unless there is a stipulation to the contrary.
    - This is a “limited liability” in a general partnership setting.

#### *Obligations of nonpartners for partnership debts*

- The only time when nonpartners become liable for the partnership debts is when:
  - There is estoppel
  - When the public is made to believe that one person is a partner of the partnership when in fact he is not, thus:

- Art. 1815 (on firm names)
- Art. 1825 (estoppel)

### **Fiduciary duties of partners**

- Partners have the duty to act for the *common benefit* of all the partners in a partnership setting.
- The fiduciary duties subsist only while the partnership subsists.

#### *Duty of diligence*

- a. Art. 1794 (liability for damages to partnership through his fault)
- b. Art. 1800 (managing partners)

#### *Duty of loyalty*

- a. In case a partner takes any amount from the partnership funds for himself, he becomes a debtor of the partnership, as well as for the interests and damages (reckoned from the time of misappropriation [art. 1789])
- b. *See* arts. 1792-1793

#### *Duty to account*

- a. Art. 1807
- b. Art. 1807

#### *Specific fiduciary duties of industrial partner (art. 1789)*

- An industrial partner is prohibited from engaging in business for himself, unless the partnership expressly permits him to do so. It also means that:
  - Since his main contribution to the partnership is his industry, an industrial partner owes to the venture and his fellow partners the obligation to devote his industry towards the partnership business
  - Even if the partnership is engaged in a particular form of business, an industrial partner cannot devote his industry to another type of undertaking for profit even when it is in a different line of business not in competition with that of the partnership.
- **Effect of breach:**
  - Exclude the industrial partner from the firm
  - The remaining partners may avail themselves of the benefits which the industrial partner may have obtained in violation of such duty, **with a right to damages**.
- Observations from *Evangelista & Co v. Abad Santos*:
  - An industrial partner need not devote his entire working hours to the partnership affairs; he may conduct nonbusiness activities (e.g., work)
  - When the personal circumstances that would prevent the would-be industrial partner from devoting fulltime were known by the capitalist partners, that constitutes an integral part of the manner and extent of the service of the industrial partner should devote to partnership affairs
  - Even when an industrial partner fails to live-up to the commitment of service he obliged himself, the matter must be raised *within a reasonable period by the other partners*; otherwise, they will be barred by laches.

#### *Specific duty of loyalty for capitalist partners (art. 1808)*

- The capitalist partners cannot engage in business which is in the same line of business which the partnership is engaged, unless a stipulation allows him to do so.
- **If breached:** The erring partner must bring to the common funds any profits accruing to him from his transactions, and shall personally bear all the losses (forfeiture of profits).

## Chapter 9: Dissolution, winding-up, and termination

**Dissolution** – The novation of the *vinculum juris* between and among the partners. It is the change in relation of the partners caused by any partner ceasing to be associated in the carrying on.

- It is an attribute of *delectus personae* and may be likened to the terms “rescission” and “extinguishment.”
- Dissolution *may not* necessarily give rise to termination and winding-up because it may just lead to the constitution of a new partnership contract among the partners who choose to proceed with the partnership business.

**Termination** – The partnership business enterprise and defines the time when *all* matters pertaining to the business enterprise have been completed.

- The point in time after all the partnership affairs have been wound up.

**Winding-up** – The process commenced by the dissolution of the contract of partnership between and among the partners and is concluded upon the termination or complete liquidation of the partnership business enterprise.

### Dissolution

<b>Dissolution effected <i>without</i> court decree</b>	<b>Dissolution effected <i>through</i> a court decree</b>
<ol style="list-style-type: none"> <li>1. Without breach:               <ol style="list-style-type: none"> <li>a. Termination of the definite term of the partnership</li> <li>b. Termination of the specific undertaking for which the partnership was constituted</li> <li>c. In a partnership at will, dissolution effected by the will of any partner <i>exercised in good faith</i></li> <li>d. By mutual withdrawal of <i>all</i> the partners</li> <li>e. Expulsion of a partner in good faith under the powers granted in the partnership agreement</li> </ol> </li> <li>2. With breach               <ol style="list-style-type: none"> <li>a. When the partnership term has not expired</li> <li>b. When the particular undertaking for which the partnership has been constituted has not yet terminated</li> <li>c. At any time, in a partnership at will, when effected in bad faith</li> </ol> </li> <li>3. Dissolution caused by <i>force majeure</i> or outside the will of the parties               <ol style="list-style-type: none"> <li>a. Loss of the specific thing promised to be contributed</li> <li>b. Partnership business becoming unlawful</li> <li>c. Death, insolvency, or civil interdiction of any partner</li> <li>d. Insolvency of the partnership</li> </ol> </li> </ol>	<ol style="list-style-type: none"> <li>1. When a partner has been judicially declared insane or is shown to be of unsound mind</li> <li>2. When a partner becomes incapacitated in performing the partnership contract</li> <li>3. When a partner is guilty of such conduct as tends to affect prejudicially the carrying on of the partnership business</li> <li>4. When a partner willfully or persistently commits a breach of the partnership agreement that it is not reasonably practicable to carry on the business in the partnership with him</li> <li>5. When the partnership can only be carried on at a loss</li> <li>6. Other circumstances that render dissolution equitable</li> <li>7. On the application of the purchaser of a partner's interest in the partnership:               <ol style="list-style-type: none"> <li>a. After termination of specified term of the partnership</li> <li>b. After termination of the particular undertaking for which the partnership was constituted</li> <li>c. At any time, in a partnership at will</li> </ol> </li> </ol>

- When a partner, without any legal/contractual basis, seeks the dissolution of the partnership, the same would constitute a “breach of contract” for which he become personally liable for damages, and for which he loses the right to wind-up its affairs, but nevertheless the dissolution would take legal effect.

- The principle of *delectus personae* overrides the principle of obligatory force of contracts.
- There is *no* legal remedy to compel the withdrawing partner to remain with the partnership agreement. Nevertheless, he is liable for damages.

#### *No breach dissolution*

- Here, there is no breach or contravention of the partnership agreement, and the dissolution of the partnership does not give rise to a liability for damages for breach.

#### *With breach dissolution*

- Here, the party seeking the dissolution would be liable for damages, and he is without right to continue to pursue the partnership business.

#### *Force majeure and other similar causes*

- None of the causes under this constitute a type of breach of the partnership agreement.

#### *Court order required-dissolution (art. 1831)*

- The grounds need to be considered carefully, each representing a public policy which takes into consideration the reality that the business purpose and future of a partnership often cannot be placed in a relatively clear vision at the time the contract is entered into. **[tranche 1]**

### **Legal effects of dissolution—in general (arts. 1832-1837)**

#### *Effect on the partnership contract and the juridical personality*

- The contract of partnership remains but only in the concept of *an association to pursue liquidation process*, but with the option of the non-defaulting partners to continue with the partnership business.
- The right and power of the partners to represent one another to pursue the partnership as a going concern is *extinguished*.
- Dissolution does not undermine any existing contracts, nor modify or extinguish existing obligations.
- The dissolution of the partnership would bring about the impairment of the partnership juridical person in whose name the business is pursued remains hovering.

#### *Effect on the partnership business enterprise*

- The business enterprise should cease to exist as a going concern only if the partners remaining do not wish to continue the partnership, whenever they are entitled under the law the option to so continue.

#### *Effects on contracts entered into with third parties*

- They remain valid. Partnership continues until the winding up of the business.

#### *Effects on determining liability of partners for damages to one another*

- For the purposes of determining whether a partner is entitled to damages, it is first necessary that a liquidation of the partnership business must be made so that the profits and losses be known and the causes of the latter and the responsibility of the defendant may be determined.

### **Effects of dissolution among the partners *inter se***

#### *When dissolution is no breach*



- Every partner has a right to insist upon the winding-down of partnership affairs.
- The remaining partners have no option to continue the business enterprise when the withdrawing partner insists on winding-up the partnership affairs.
- Thus, the only way which the remaining partners can hope to continue the partnership business is to *come to a settlement of the liquidation of the withdrawing partner's equity interests*.

*When dissolution is caused by the bona fide expulsion of a partner*

- The expelled partner is without power or authority to insist upon the formal winding-up and liquidation of the partnership.
- The choice to continue with the business *or* to wind-up and terminate the partnership is with the remaining partners.
- Following liquidation, the expelled partner shall only receive in cash only the net amount due him from the partnership.

*When dissolution is with breach*

- Non-breaching partners' rights:
  - Participate in the net assets of the partnership after discharge of all partnership liabilities
  - Get damages for breach of the agreement, as against each partner who wrongfully caused the dissolution
- All the partners who have *not* caused the wrongful dissolution, may, if they so desire:
  - Continue the business in the same name, either by themselves or jointly with others, during the rest of the agreed term for the partnership; and
  - For that purpose, may possess the partnership property, *provided* they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at dissolution, less any damages for breach of the agreement and in like manner indemnify him against all present or future partnership liabilities
- A partner who has wrongfully caused the dissolution shall only have
  - *If the business is not continued*: All the rights of a partner for share in the net assets of the partnership after payment of all its liabilities, *subject to liability for damages* incurred due to such wrongful dissolution
  - *If the business is continued*: The rights as against his co-partners and all claiming through them in respect of their partnership interests, to have the value of his partnership interests, less any damage caused to his co-partners by the dissolution, ascertained and paid to him in cash or the payment secured by a bond approved by the court, and to be released from all existing liabilities of the partnership
- When dissolution caused by rescission of the partnership agreement due to fraud or misrepresentation
  - To a lien on the surplus of the partnership property after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him
  - To stand, after all liabilities to third persons have been satisfied, in the place of creditors of the partnership for any payment made by him in respect of the partnership liabilities
  - To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership

*Effects of dissolution on partnership liabilities existing or accrued at the time*

- **General rule:** The dissolution of the partnership does not of itself discharge the existing liability of any of the partners.
- The only manner by which a partner may be discharged from any existing liability is by an agreement to that effect with the partnership creditors and the persons or partnership continuing the business.

### *Effects of dissolution on partnership liabilities contracted or incurred after dissolution*

1. Those that were incurred pursuant to winding-up proceedings
  - a. All contracts and transactions entered into after dissolution of the partnership, which are in pursuit of the winding-up of partnership affairs, are valid and binding.
  - b. Exceptions (i.e., where partnership not bound even for winding-up liabilities):
    - i. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the acting partner's want of authority; or
    - ii. Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in a newspaper of general circulation in the place at which the partnership business was regularly carried on
2. Those that were incurred as new business although the partnership is in winding-up process
  - a. When dissolution is by the act, insolvency or death – The acting partner who does not know of the act, insolvency or death will legally bind the partners. If he knows and contracts, the partner shall be liable.
  - b. When the dissolution is not by the act, insolvency or death of a partner – When the dissolution is other than by the act, insolvency or death, knowledge of the fact of dissolution is presumed to have reached every partner and as among themselves, a partner who incurs a liability in the name of the partnership, is deemed to be *acting without authority or in bad faith*, and *only* such acting partner shall be liable for the liability incurred.
  - c. As to third party creditors – Whatever may have been the cause of dissolution of the partnership, third parties who in good faith enter into any contract with the partnership through any of the partners, are protected in their contractual expectations that the contract is valid and binding against the partnership.
    - i. Particular rule of limited liability – Liability to third parties in good faith shall be satisfied out of partnership assets alone (art. 1834).
    - ii. When creditors not deemed to be in good faith – The partnership is in *no* case bound by any act of a partner after dissolution when:
      1. The acting partner has become insolvent
      2. The partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs (art. 1834)
    - iii. Rule on partnership by estoppel – The liability of any person who, after dissolution, represents himself or consents to another representing him as a partner in a partnership engaged in carrying on the business shall be the same as provided in art. 1825 (partnership by estoppel).
3. Those that were incurred when the partnership enterprise has been continued and no winding-up process have been pursued

### **Winding-up of partnership affairs**

#### *Who has authority to wind-up*

1. The partner/s who have such authority under the agreement
2. In the absence of any such agreement
  - a. The partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not insolvent, has the right to wind up the partnership affairs
  - b. Any partner or his legal representative or assignee, upon cause shown, may obtain winding-up by the courts

### **Rules and procedure for winding-up and liquidation of partnership affairs**

1. What constitutes partnership property?
  - a. The partnership property
  - b. The contributions of the partners necessary for the payment of all the liabilities of the partnership
2. What are the priority rules against partnership property?
  - a. Those owing to creditors other than partners
  - b. Those owing to partners other than for capital and profits
  - c. Those owing to partners in respect of capital
  - d. Those owing to partners in respect of profits

*Enforcing contributions from partners to cover partnership debts*

- The partners shall contribute as provided by art. 1797 the amount necessary to satisfy the liabilities and that the individual property of a deceased partner shall be liable for such contribution (art. 1839).
- An assignee for the benefit of the creditors or any person duly appointed by the court shall have the right to enforce the contribution specified.
- Any partner of his legal representative shall have the right to enforce the contributions to the extent of the amount which he has paid in excess of his share of the liability.

*Priority rules between partners' creditors and partnership creditors*

- When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the right of lien of secured creditors.

*Priority rules when partner is insolvent*

- When a partner or his estate has become insolvent, the claims against his separate property shall rank in the following order:
  - Those owing to separate creditors
  - Those owing to partnership creditors
  - Those owing to partners by way of contribution

*Partner may demand share in net assets only after settlement of claims of partnership creditors*

- A share in a partnership can be returned only after the completion of the latter's dissolution, liquidation and winding up of the business (*Villareal v. Ramirez*).
  - A partner has no right to demand from the other partners for them to be personally liable for the return of his contribution, especially when the partnership operations have been at a loss.

**Continuance of partnership business instead of winding-up**

1. Who may continue partnership business and the obligations assumed?
  - a. The partners who have not caused the dissolution wrongfully.
    - i. Then, they must secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the point of dissolution, less any damages recoverable from said defaulting partner, as well as indemnify him against all present or future partnership liability.
2. Disposition of liabilities when partnership business is continued (art. 1840) – The creditors of the dissolved partnership shall also be creditors of the person or partnership continuing business:
  - a. When any new partner is admitted into an existing partnership, or when any partner retires and assigns his rights in partnership property to two or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs

- b. When all but one partner retires and assigns their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others
  - c. When any partner retires or dies and the business of the dissolved partnership is continued, with the consent of the retired partners or the representative of the deceased partner, without any assignment of his right in the partnership property
  - d. When all the partners or their representatives assigns their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership
  - e. When any partner wrongfully causes a dissolution and the remaining partners continue the business, either alone or with others, and without liquidation of the partnership affairs
  - f. When a partner is expelled and the remaining partners continue the business either alone or with others without liquidation of the partnership affairs
- 3. Disposition of liabilities when dissolution is caused by the retirement or death of a partner (art. 1841)
  - a. The partner or legal representative as against such person or partnership may have the value of his interest at the date of dissolution ascertained
  - b. The partner or his legal representative shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership, with option:
    - i. To receive interest, or
    - ii. In lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership.
- 4. Partner's right to demand an accounting (art. 1842)
  - a. In the absence of any agreement to the contrary, the right to receive an accounting of his interest shall accrue to any partner, or his legal representative, as against the winding-up partners, or the surviving partners, or the person or partnership continuing the business, at the date of dissolution.
  - b. The right to accounting does not prescribe during the life of the partnership, and that prescription begins to run only upon the dissolution of the partnership and final accounting is done.

## Limited Partnerships

### Essence of the medium of limited partnerships

- *Definition:* It is one formed by two or more persons under the provisions of the following article, having as members one or more general partners and one or more limited partners. The limited partners shall not be bound by the obligations of the partnership (art. 1843).
- *Purpose and essence:* It is a creature of statute, its object being to enable persons not desiring to engage in a particular business to invest capital in it and to share in the profits, without becoming liable as a general partners for all partnership debts.
  - It is a form of partnership in which the liability to third persons of one or more of its members is limited to a fixed amount.
- It is a **solemn contract** in that no limited partnership is constituted, unless art. 1844 is followed.
  - Nevertheless, the failure to comply with the formalities only brings about the creation of a **general partnership**.
- “Limited liability” – The limited partners are not bound by the obligations of the partnership.
  - This is because the debts and obligations of the partnership pertains to it as a separate juridical person.
    - This stems from the principle of privity or relativity of contracts.
    - It’s actually “no liability!”
- A limited partnership (LP) does not have mutual agency, *delectus personae*, and the right to manage the partnership affairs.

### Requirements for the formation of an LP

1. Sign and swear to a certificate of LP, which shall contain:
  - a. Partnership name, adding thereto “Limited”
  - b. Character of the business
  - c. Principal place of business
  - d. Term of existence
  - e. Name and residence of each of the partners, with clear designation of who are general and limited partners; and the right, if given, of partners to admit additional limited partners
  - f. Contributions to the partnership, and the terms under which additional contribution are to be made by the limited partners
  - g. Right, if given, of a limited partner to substitute and assignee
  - h. Time, if agreed upon, when the contributions of limited partners shall be returned; and the right, if given, to demand and receive property other than cash in return for such contributions
  - i. Share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution; and the right, if given, of one or more of the limited partners to priority over other limited partners

- j. Right, if given, of the remaining general partner/s to continue the business on the death, retirement, civil interdiction, insanity or insolvency of a general partner
- 2. Register such certificate with the SEC
  - a. The rights, if not expressly given, does not exist.
  - b. *Purpose*: To ensure the limitation on the liability of limited partners. The purpose of the certificate's registration is to acquaint third persons dealing with the partnership.
  - c. An LP may be formed if there is *substantial compliance* with the foregoing requirements.
    - i. Nevertheless, the issue as to "substantial compliance" is irrelevant as among partners *inter se* because they are bound by the contractual commitment under the partnership agreement to hold the limited partners liable only to the extent of their contribution.
  - d. The nonfiling of the certificate does not bring about an LP<sup><</sup> and what is deemed constituted is a general partnership.

### **False statement in the SEC certificate**

- If the certificate contains a false statement, one who suffers loss relying on such statement may hold liable any party to the certificate who knew the statement to be false (art. 1847).
  - He must correct it upon learning of the false statement.
- The limited partner who signs the false certificate may be *unlimitedly liable*—but only the injured third party can hold him liable.

### **Name of LP**

- It is not required as an essential element to establish an LP that the firm name should contain the names of the general partners, or any of them.

### *Surname of a limited partner*

- Their surname should not appear, unless it happens to be the surname of a general partner or that prior to the time when the limited partner became such, the business had been carried on under a name in which such surname appeared.
  - A limited partner whose surname appears in the firm name shall be liable as a general partner (estoppel).

### *Inclusion of the term 'limited'*

- Failure to do so will not strip the limited partners of their right to claim limited liability (CLV)
  - The certification, after all, shows who are the limited partners

### *No firm name in the certificate*

- There is no substantial compliance.

### **Contributions of limited partners**

1. Contribution of service
  - a. The contributions of a limited partner may be cash or property, but *not services* (art. 1845). To do so would make that partner a manager of the firm.
  - b. When the contribution is service, he becomes unlimitedly liable and a general partner.
  - c. The contribution of service of a limited partner should be distinguished from being compensated (art. 1855).
    - i. This means that by the very position of being a limited partner, he will be accorded periodic payments (compensation). Such payments shall be considered as part of profit distribution.
2. Indication of the amount contributed
  - a. It is imperative in the certificate that the contributions of limited partners must be given prior to or at the time of the execution.
    - i. Mere indication of an intent to contribute is *not* sufficient and would constitute a false statement (CLV). This is not supported by art. 1858, which provides that it is *valid* to agree under the terms of the certificate that the limited partner/s shall pay their contribution in the future.
  - b. What if the limited partner fails to give his contribution? The penalty for such false statement makes him personally liable (beyond his promised contribution), and only to a person who suffers loss by reliance on such false statement (art. 1847).

### **When certificate must be canceled or amended**

1. Cancellation
  - a. When the partnership is dissolved or all limited partners cease to be such.
2. Amendment
  - a. See art. 1864.
3. Procedure to amend (art. 1865)
  - a. Conform with art. 1844
  - b. Be signed and sworn to by all the members, and an amendment substituting a limited partner or adding a limited/general partner shall also be signed by the member to be substituted/added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning (original) limited partner
  - c. *If a person refuses to sign*, the person desiring the cancellation or amendment may resort to court.
  - d. A certificate is amended or canceled when there is filed for record with SEC:
    - i. In writing accomplished in accordance with the provisions for cancellation or amendment
    - ii. A certified copy of the court order ordering amendment or cancellation
  - e. After the certificate is duly amended, the amended certificate shall thereafter be for all purposes the certificate provided in the provisions of the Law on Partnerships

### **General and Limited Partnerships**

#### **General partnerships**

*Who is a general partner?*

- Every partner who does not qualify as a limited partner through compliance with art. 1844 is a general partner and subject to the unlimited liability rule for partnership obligations.

#### *Powers and rights of a general partner*

- A general partner shall have the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, *except that such general partner in a limited partnership shall have no power nor authority to do any of the following acts without the written consent/ratification of the specific act by all the limited partners:*
  - Do any act in contravention of the certificate
  - Do any act which would make it impossible to carry on the ordinary business of the partnership
  - Confess judgment against the partnership
  - Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose
  - Admit a person as a general partner
  - Admit a person as a limited partner, unless the right to do so is given in the certificate
  - Continue the business with partnership property on the death, retirement, insanity, civil interdiction or insolvency of a general partner, unless the right to do so is given in the certificate (art. 1850)
- Rationale for the 7 prohibitions above:
  - They would contravene the contractual stipulations with the limited partners
  - Affect the very commercial reason by which they agreed to be passive investors
  - Undermine the fiduciary duties of the general partners to manage the partnership enterprise themselves for the limited partners
- Three things to note (CLV)
  - When the certificate allows the general partner to admit a limited partner, he must still follow the amendment process and cannot do so summarily.
  - The act of the general partners in relation to any of the instances in art. 1850 is void; but they shall not prejudice third parties because the issue here is an intra-partnership one.
    - In other words, third parties dealing with a limited partnership do not have to know that it is a limited partnership since dealings with the general partners in the regular pursuit of business are valid and binding upon the partnership and all its partners.
  - The enumeration in art. 1850 stands apart from the enumerated act of ownership/strict dominion under art. 1818 which cannot be effected by less than all the partners (i.e., unanimous consent is required). Only two overlap:
    - To do any other act which would make it impossible to carry on the ordinary business of a partnership
    - To confess a judgment against the partnership
    - Third parties dealing with the limited partnership are *only aware of the general partners* and as to them, the limited partners are invisible. Hence, in all matters under art. 1818 *not included* in art. 1850, third parties should *only* be bound to determine if *all the general partners* have consented to such act.



### *Duties and obligations of the general partner*

- A general partner shall be subject to all the restrictions and liabilities of a partnership without limited partners.
- A general partner is saddled with the same fiduciary duty of loyalty, and cannot engage in any business that conflicts with that of the limited partnership (art. 1789).
- A general partner who is an industrial partner is also saddled with the same fiduciary duty of loyalty of being disqualified from engaging in any form of business venture (id.)
  - Compare: Limited partners do not have any rights of management, and consequently, do not act as agents to one another, of the partnership itself, and of the general partners.

### **Limited partners**

#### *Who is a limited partner*

- No member of a partnership shall be considered a limited partner, unless he is so designated in the certificate with the SEC.
- His surname cannot be part of the firm name (art. 1844).
- He does not have the right or option to contribute service to the partnership.
  - When any of such requisites are not complied with/ceased to exist, then such limited partner is *legally a general partner*.

#### *Erroneous but in good faith limited partner*

- A person who has contributed to the capital of the business conducted by a person/partnership *erroneously believing that he has become a limited partner*, does not by his exercise of the rights of a limited partner:
  - Become a general partner
  - Be bound by the obligations of such person or partnership
- Upon knowing the mistake, the person must promptly renounce his interest in the profits or the business or other compensation by way of income (art. 1852)
- It is only when he takes part in the control of the business that he becomes liable as a general partner, or when having realized the mistake, he does not renounce his interests.
- This is due to a contract of limited partnership being solemn.

#### *Rights and powers of the limited partner<sup>1</sup>*

1. Right to limited liability (arts. 1843, 1848)
2. Right to the return on his contribution (art. 1851)
3. Right to receive his share in the profits and compensation by way of income (id.)
4. Right to assign his equity interest (id.)
5. Right to have the partnership books kept at the principal place of business of the partnership, and at a reasonable hour to inspect and copy any of them (id., no. 1)
6. Right to have on demand true and full information of all things affecting the partnership and a formal account of partnership affairs whenever circumstances render it just and reasonable (id., no. 2)

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<sup>1</sup> A limited partner has such rights and only such rights as the law and his contract afford.

7. Right to have the dissolution and winding-up by decree of court (id., no. 3 & art. 1857)

Right to limited liability

- Basically, art. 1843.
- Effects:
  - They cannot have their surnames form part of the partnership name
  - They cannot participate in the management and control of the partnership business
  - They are prohibited from contributing service/industry into the partnership
- It is poised primarily in relationship to the creditors of the partnership:
  - They (creditors) have a right to expect that all partners are unlimitedly liable, unless they are so indicated as limited partners in the certificate
  - They have a right to expect that a partner who participates in partnership affair is a general partner
    - Matters relating to the (non)application of the principle of limited liability can be raised *only by partnership creditors*.

Right to return of contributions

- One of the provisions that the certificate may contain is the time, if agreed upon, when the contribution of each limited partner is to be returned (art. 1841[1][h]).
- If this stipulation is not included, the limited partner retains the right to return of contributions because as a mere passive investor he must commercially be linked to his ability to liquidate his investment within a reasonable time.
- Where there are several limited partners, all the members may agree that one or more of the limited partners shall have a priority over other limited partners.
  - But this priority must be in the certificate. Lacking a stipulation, all the limited partners shall stand upon equal footing (art. 1855).
- A limited partner shall not receive from a general partner or out of partnership property any part of his contribution, until:
  - All the liabilities of the partnership, *except liabilities to general partners and to limited partners on account of their contributions, have been paid, or there remains property of the partnership sufficient to pay them;*
  - The consent of all members is had, *unless the return of the contribution may be rightfully demanded under the law;*
  - The certificate is canceled/amended as to set forth the withdrawal or reduction
- When all liabilities to third parties have been paid/there will be enough assets to cover them, a limited partner may rightfully demand the return of his contribution:
  - On the dissolution
  - When the date specified in the certificate has arrived
  - After he has given six months' notice in writing to all other members, if no time is specified in the certificate
- Only cash may be returned, unless stipulated to the contrary/there is unanimous consent (art. 1857).

Right to profits/compensation by way of income

- A limited partner may receive from the partnership:
  - The share of the profits, or
  - Compensation by way of income stipulated in the certificate (art. 1856)

- This should *not* entitle the limited partner to be employed/participate in the management of or in the operations of the firm.
- This means any arrangement by which the distribution of profits is termed “compensation” or “salary” done on a regular/periodic basis as may be agreed upon, and paid to him by virtue of being a partner *only*.

#### Right to assign limited partner's interest

- Under art. 1859, a limited partner's interest is assignable, and the assignee steps into the shoes of the assigning limited partner *only when admitted by the other members*.
  - In any case, an assignee becomes substituted limited partner when the certificate is appropriately amended.
- Furthermore, an assignee has the right to become a substituted limited partner if *all* the members consent thereto, or if the assignee, being empowered, gives the assignee that right. *This act must still conform to the amendment process of the certificate!*
- The substituted limited partner also has the rights and powers of his assignor, *except those liabilities which he was ignorant of at the time he became a limited partner, and which could not be ascertained from the certificate*.
- Nevertheless, an assignee *does not have the right to information or accounting or inspection* of the books.
- Quaerendum: If limited partners are mere *passive investors*, why is their consent required in a decision by the general partners to *admit additional limited partners* (whenever that power is *not expressly* provided for in the certificate)?
  - It requires a formal indication in the Certificate, which comes into the application of principle of mutuality (because the certificate is a contract).
  - A new limited partner will “eat up” on the proportional share of the existing limited partners.
  - The admission of a limited partner dilutes the proportional share that each of the existing limited partners are to have in the distribution of the net assets of the partnership upon dissolution and winding-up.

#### Heirs of deceased general partner succeed *generally* as limited partners

- No direct statutory provision on this, but this position is supported by *Goquiola v. Sycip*.
- CLV does not agree, because a formal amendment is required. It's not *ipso jure*.

#### Limited rights to partnership affairs

1. Have the partnership books kept at the principal place of business
2. To inspect and copy them at reasonable hours
3. Having on demand true and full information of all things affecting the partnership
4. A formal account of partnership affairs whenever circumstances render it just and reasonable (art. 1851).

#### Limited partner may loan money to or transact business with the partnership

- A limited partner partner may loan money to, and transact other business with, the partnership *without adverse consequences to his standing as a limited partner and his right to demand only limited liability exposure*.

- When he is not also a general partner, a limited partner may receive on account of resulting claims against the partnership with general creditors a *pro rata* share of the assets.
- But the limited partner shall *not*:
  - Receive/hold as collateral security any partnership property
  - Receive from a general partner or the partnership any payment if at the time the assets of the partnership are *not* sufficient to discharge partnership liabilities to persons as general or limited partners.

#### Right to dissolve the limited partnership

- He may also demand dissolution and winding up by decree of court (art. 1851[3])
- A limited partner may also have the partnership dissolved and its affairs wound-up when:
  - He rightfully but unsuccessfully demands the return of his contribution, *or*
  - The other liabilities of the partnership have not been paid, or the partnership property is insufficient to their payment, and the limited partner is otherwise entitled to the return of his contribution.

#### **Obligations of limited partners**

1. On original contributions to the partnership – A limited partner is liable to the partnership for the difference between his contribution made and contribution he pledged in the certificate.
2. On additional contributions – A limited partner may be obliged during the life of the partnership to give additional contribution if such is provided in the certificate. *In the absence of such a stipulation, a limited partner cannot be compelled to do so.*
3. On returned contributions – *See art. 1858.*
4. Liable as trustee of the partnership – The limited partner is liable as a *trustee* to the partnership for:
  - a. Specific property in the certificate as contributed by him, which has not been delivered/wrongfully returned to him
  - b. Money/property wrongfully paid or conveyed to him on account of his contribution (art. 1858).
5. Fiduciary duties of limited partners – Limited partners are not agents of the partnership, thus, they are not bound by fiduciary obligations.
6. General lack of standing in partnership suits – *See art. 1866.*

#### *When limited and general partner at the same time*

- A person can be both a *limited and general partner at the same time, provided this is so indicated in the certificate* (art. 1853).

#### **Dissolution and winding-up of limited partnership**

##### *Causes of dissolution*

1. Retirement
2. Death
3. Insolvency
4. Insanity

5. Civil interdiction of a *general* partner

Still, the general partners may continue the business, provided that:

1. They have a right to do so stated in the certificate, *or*
2. With the consent of all members (art. 1860).

*Settling of accounts – hierarchy*<sup>2</sup>

1. Those to creditors, in order of priority as provided by law, *except to those limited partners on account of their contributions*, and to general partners;
2. Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions
3. Those to limited partners in respect to the capital of their contributions
4. Those to general partners other than for capital and profits
5. Those to general partners in respect to profits
6. Those to general partners in respect to capital

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<sup>2</sup> This only pertains to limited partnerships (art. 1863). For general partnerships, refer to art. 1839.

## Joint Ventures

### Nature of joint ventures in Philippine setting

*Joint venture arrangements primarily governed by contract law principles*

- Apart from specific provisions in the NIRC, there is *no* statutory provision that formally governs joint ventures (JV), although they have been recognized in jurisprudence and have relatively become commonplace in commercial ventures.
- Thus, JV agreements fall generally within the realm of Contract Law.

*Joint ventures are species of partnership*

- JVs fall within the definition of a partnership under art. 1767.
- JVs are a form of a particular partnership; there should be no doubt that the legal incidents and consequences imposed on every kind of partnership must befall every JV agreement.

	Ordinary partnership	Joint venture
Purpose or scope	Organized for a general business venture	Organized for a specific project or undertaking
Term or duration	Does not have a definite term of existence	Limited to the completion of the specific project or undertaking
Classification	A general or ordinary partnership	A particular partnership, which has for its object determinate things, their use or use, or a specific undertaking

### Definitions which lead to it being a partnership

- An association of persons or companies jointly undertaking some commercial enterprise generally all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy connected therewith, and duty, which may be altered by agreement to share both in profit and losses; the acts of working together in joint project (*Kilosbayan v. Guingona*).

### *Partnership characteristics of the joint venture*

Since a JV is a species/special type of partnership, it ought to have the following characteristics of a partnership:

1. It constitutes a juridical personality separate and distinct from that of each of the co-venturers
2. Each of the co-venturers would be liable with their separate property to the creditors of the JV beyond their (promised) contributions, under the doctrine of unlimited liability
3. Even if a co-venturer transfers his interest to another, the transferee does *not* become a co-venturer to the others in the JV unless all the other co-venturers consent, in consonance with the *delectus personae* principle applicable to partnership
4. Generally, co-venturers acting on behalf of the JV are agents of the JV and of each other, in accordance with the doctrine of mutual agency

5. Death, retirement, insolvency, civil interdiction or dissolution of a co-venturer dissolves the JV

In *J. Tiosejo Investment Corp. v. Ang*, the court held that a JV is considered a form of partnership. Thus, *all partners are solidarily liable* with the partnership for everything chargeable to the partnership.

#### *Special treatments given to joint ventures*

- In general, a corporation has no power to enter into a partnership, but recognized that a corporation may validly enter into a JVA where the nature of that venture is in line with the business authorized by its character (*Tuason v. Bolaños*).

#### SEC opinions

- General rule: A corporation cannot enter into a contract of partnership with an individual or another corporation, on the premise that it would be unduly bound by the acts of the persons who are not its duly appointed and authorized agents and officers, and entirely inconsistent with the policy of the law that the board shall manage the corporate affairs separately and exclusively.
- Requisites for the exceptions:
  - The authority to enter into a partnership relation is expressly conferred by the articles of incorporation, and the nature of the business venture to be undertaken is in line with the business authorized by the articles of incorporation
  - The agreement on the articles of partnership must provide that *all* the partners shall manage the partnership, and the articles of partnership must stipulate that all the partners shall be solidarily liable for all the obligations of the partnership
  - If it is a foreign corporation, it must obtain a license to transact business in the country in accordance with the Corporation Code
- Subsequently, the SEC opined that a corporation may become a limited partner in a limited partnership.

#### Revised Corporation Code

- Sec. 35 (h) of the RCC provides that every corporation incorporated under the Code has the power and capacity to enter into a partnership, JV, or any other commercial agreement with natural and juridical persons.

#### **Alternative forms in structuring JVs**

1. Informal JVA
2. Formal partnership agreement
3. JV corporation (JVC)

#### *Informal JVA*

- In cases of corporations which come together in co-venture over a particular project, such venture can be pursued merely as a private enterprise with no intention to present a new or separate firm or company, and much less a separate juridical person to the public.
- JV is akin to a *particular partnership*:

- A joint account, the participating merchants can transact business under their own names, and can be individually liable therefor
  - Usually, but not necessarily a joint adventure is limited to a single transaction; a partnership generally relates to a continuing business of various transactions of a certain kind
- In such a situation, a JVA or MOA is executed, but the business enterprise will be pursued in the names of the co-venturers. No separate company is set up, no separate books of account are kept, no formal registration of the enterprise is made. The co-venturers intend their relationship to be governed by the terms agreed upon in the JVA.

#### SEC recognition of an informal JVA

- A JV of two corporations need not be registered with the SEC, provided that it will not result in the formation of a new partnership or corporation.

#### Example of an informal JVA

- *Traveño v. Bobongon Banana Growers MPC* – the court held that the contract involved was far from being a job contracting agreement, but a business partnership that partakes of the nature of a JV.
- CLV: DFI could have been held liable under the partnership principle of *mutual agency*.
  - When the MPC hired the laborers in the plantation and illegally terminated them, such acts were deemed binding on DFI, since the act of a partner binds not only the acting party, but also the partnership and other partners.

#### JVA hidden through another form of contract

- Parties do this to hide to the public the real nature of their arrangement, or will hide their true intent.
- *Mendoza v. Paule*: A JVA to undertake a government project was done using an attorney-in-fact arrangement.
- *Philex v. CIR*: A JVA to operate a mining project was done using a power-of-attorney
  - The parties may choose to treat one another as not being bound by a partnership agreement, but when controversy arises by which their rights and obligations have to be determined, the courts would have no choice but to impute the legal relationship of a partnership or JVA when the essential elements of a partnership are present.
- *Kilosbayan Inc. v. Guingona*: PCSO tried to circumvent the prohibition from it holding and conducting lotteries in JV by executing a contract of lease, purportedly for PCSO to lease the lottery facilities of OGMC to operate nationally the online lottery system.

#### Formal JVA

- Under such an arrangement, the co-venturers execute formal Articles of Partnership or a JVA, embodying their arrangements, firm name, structure of the company they are forming, and register it with the SEC.
- It will operate under the rules and principles pertaining to particular partnerships.
- A JV pursued under a formal JVA provides better protection for the parties because they have a set of laws by which they can base their rights and claims.
- But in *Narra Nickel v. Redmont*, the parties therein used the JVA to circumvent the nationality requirement for exploitation of natural relations.



## JV corporation (JVC)

- Equity joint ventures are also available, which may cover the formation of a new JVC, with each co-venturer being allocated proportionate shareholdings in the outstanding capital stock of the new JVC.
- An equity JV may also be pursued where a co-venturer is allocated the agreed shares of stock in an existing corporation, either from new issuances of the capital stock of the existing corporation, or sold shares from those already issued in the names of the other co-venturers.

### Status of agreement to form a JVC

- It is valid. The failure to reduce the agreement into writing does not affect its validity or enforceability as there is no law which provides that an agreement to incorporate must be in writing (*Fong v. Dueñas*).
- Thus, when the parties failed to comply with their undertakings, the JVA was deemed extinguished through resolution under art. 1192.
  - Thus, they must return to the investing parties their capital contributions.

### Corporate principles vs. JVA provisions

- In situations where the JVA contain provisions not covered by the charter of the JVC or vice-versa, the resolutions of issues arising therefrom ought to be as follows:
  - In case of conflict, the charter of the JVC prevails
  - In case of provisions/clauses in the JVA not in the charter of the JVC, such provisions and clauses remain binding among the parties, but do *not* bind the JVC or other parties *not* signatories thereto
- Although the JVA may contain rules on management and control of the JVC, it does not authorize the co-venturers to override the business management of the corporate affairs of the JVC by its BOD.
- The Supreme Court affirmed the principle that JVA must primarily be viewed as binding contractual commitments.
  - Thus, when the intent is to create a JV—not a corporation—the rules under the Corporation Code applies
  - It shows that a JVA is **first and foremost a contractual agreement**, and as much as possible the contractual intent be given realization.

### JV company organized as a close corporation

- Close corporation:
  - All of the corporation's issued stock are held on record by not more than 20 specified persons
  - All of the issued stock of all classes shall be subject to one or more specified restriction on transfer in the nature of a ROFR
  - The corporation shall not list any stock exchange or make any public offering of any of its stock of any class
- Under a close corporation setting, it may be provided in the AOI that the business shall be managed by the stockholders of the corporation, rather than the BOD, and the officers and employees may be selected directly by the stockholders.

- CLV: It may be possible that even when a corporation does not comply with the definition of a close corporation, the same principles apply to equally closely-held corporation, such as those organized pursuant to a formal JVA.
- The provisions of the Corporation Code on close corporations should be deemed to be available to resolve issues pertaining to JVC.

#### Right of first refusal; a *delectus personae* feature in a JVC scheme

- In *JG Summit Holdings Inc. v. CA*, the court upheld a ROFR in the shares of stocks of the JVA, because it was meant to protect the original/remaining joint venturers/shareholders from unacceptable third persons.
- It was akin to the principle of *delectus personae*—no one can be a member of the partnership association sans consent of *all* other associates.

#### **Aspects which influence choice of JV scheme**

1. Defining JV scope of business activity
  - a. The principal consideration in defining the scope of the business activity basically revolves around the issue of restrictions on foreign equity, management and control on certain restricted areas or activities.
2. Limited liability feature
  - a. The co-venturers would be faced with the prospects of “unlimited liability” pervading in such arrangement.
  - b. When the JV arrangements among co-venturers provided for pursued their business through a JVC, they are bound by the *Corporate Law* principle of *limited liability*.
  - c. The use of a JV allows the co-venturer to take full advantage of the limited liability feature of the corporate vehicle which is *not* present in a formal partnership agreement.
3. Exclusions of new parties; non-dilution of equity
  - a. See discussion on ROFR above.
4. Tax issues pertinent to JV
  - a. It is considered a corporate taxpayer because both a partnership and a JV are treated as corporate taxpayers under the NIRC.
  - b. JVs exempt from income taxation
    - i. Under PD 929, JVs formed for the purpose of undertaking construction projects were exempt from CIT.
    - ii. Under PD 1682, JVs that engage in petroleum operations were exempt from CIT.
    - iii. Under § 22 (b), NIRC, the same exemptions apply.
  - c. Informal JV may enjoy tax advances
  - d. Zero-rated dividends for JVC

#### **JVA between government corporations and private entities**

##### *Legal basis for the JV guidelines*

- EO 423, series of 2005.
- Thus, NEDA issued the JV Guidelines in April 2008, which was subsequently revised in June 2013.

##### *Objectives and principles underpinning the JV guidelines*

1. To prescribe the rules, guidelines, and procedures in the forging of JVAs
2. To encourage pooling of resources and expertise between the government and private sector entities through JVs as a viable, efficient and practical alternative in pursuing development goals of the government
3. To ensure that all JVA are entered into under the policy that all government contracts shall be awarded through a transparent process

#### Principles

1. Free competition
2. Efficiency
3. Conflict-free
4. Government divestiture
5. Agency accountability

#### *JVA covered*

1. JV Company – A stock corporation incorporated and registered under the corporation code, of which 50% or less of the outstanding capital stock is owned by the government. The JVC shall be registered by the JV partners that shall perform the primary functions and obligations of the JV as stipulated under the JVA.
2. Contractual JV – A legal and binding agreement under which the JV partners shall perform the primary functions and obligations under the JVA without forming a JVC.

#### *Guidelines in entering JVA*

1. Parameters for the JVA – The JVA should be clear in its intent to undertake a specific activity that is responsive to national development goals and objectives.
  - a. Profit-making is not the main purpose for the participation of a government entity (GE) in a JV activity.
2. JV company as the preferred mode of implementing JVA
3. When JV company is *not* the best mode, it may opt to implement the JV project through a contractual agreement, using the same parameters as those required for JVC.
4. Transfer of JV project or facility – The ownership of the JV project/facility may be transferred to either the GE or private sector partner after the expiration of the JVA, provided that:
  - a. JV projects which involve full divestment or transfer of ownership of government assets or properties to a private sector partner shall be approved by the Privatization Council
  - b. JV projects which involve divestment of government equity that is not in the form of asset/property shall be approved by the GCG.
5. Procurement activities financed by GE – The GPRA applies, regardless of source of funds.
6. When involving government assets or properties – The JVA may be terminated/rescinded if the private sector partner fails to deliver or perform any major obligations prescribed therein. The GE may likewise forfeit the performance security of the private sector partner.

#### *Process for entering JVA*

1. Requirements/conditions for JV proposals:
  - a. The JV activity is within the mandate and charter of the GE concerned

- b. The JV activity is responsive in meeting national or specific development goals and objectives
  - c. The JV proposal clearly describes the proposed investment, including its total cost, activities, objectives, source of funding, extent and nature of the proposed participation of the GE concerned, and the relevant terms and conditions
  - d. The JV proposal establishes all the components in determining the overall feasibility of the JV proposal, which include, among others, the technical, financial, economic and legal aspects
  - e. The terms and conditions of the approval of the PC, if applicable
- 2. Mode of selecting a JV partner
  - a. Competitive selection
  - b. Negotiated JVs
- 3. Deviations and amendments to the JVA
  - a. The GE shall *not* proceed with the award and signing of the contract if there are material deviations from the parameters and terms and conditions set forth in the proposal/tender documents.
  - b. Any amendment to a JVA *after* award and signing of contract shall undergo approval by the appropriate authority. Noncompliance with the approval process shall render the amendment *null and void*.