A KOMMANDIT PARTNERSHIP AND A LIMITED PARTNERSHIP: A COMPARATIVE-LEGAL ANALYSIS OF SIMILARITIES AND DIFFERENCES OF TWO FORMS OF CARRYING OUT JOINT ACTIVITIES

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ABSTRACT

This article carefully analyzes the similarities and differences of a limited partnership and a kommandit partnership based on the authors' scientific points of views and legislation of Common law and Continental law countries. This article presents the historical overview of the evolution of these forms of partnerships together with the current regulation of their legal status by means of studying the legislation of the United Kingdom, the Russian Federation and the Republic of Uzbekistan. Moreover, this article provides a comparative legal analysis of the legal concept of a limited partnership and a kommandit partnership. Furthermore, the article contains the suggestions directed to the enhancement of the legal regulation of the institute of a kommandit partnership by introducing a positive foreign experience.

Key words: *a kommandit partnership, a limited partnership, Common law system, Continental law system, legal entity, analogue, similarities, differences.*

КОММАНДИТ ШИРКАТ ВА ЧЕКЛАНГАН ШЕРИКЛИК: БИРГАЛИКДА ФАОЛИЯТ ОЛИБ БОРИШ ШАКЛЛАРИ ЎХШАШ ВА ФАРҚЛИ ЖИХАТЛАРИНИНГ ҲУҚУҚИЙ-ҚИЁСИЙ ТАҲЛИЛИ

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АННОТАЦИЯ

Ушбу мақолада коммандит ширкат ва чекланган шериклик шаклларининг ўхшаш ва фарқли жиҳатлари олимларнинг илмий фикрлари ҳамда Умумий ҳуқуқ ва Континентал ҳуқуқ қонунчилиги асосида таҳлил қилинади. Бу мақолада ушбу икки биргаликда фаолият олиб бориш шаклларининг тариҳий келиб чиқиши ҳамда ҳозирги кундаги ҳуқуқий ҳолати Буюк Британия, Россия ва Ўзбекистон Республикаси қонунчилиги асосида кўриб чиқилади. Бундан

ташқари бу мақолада коммандит ширкат ва чекланган шерикликнинг қиёсий-ҳуқуқий таҳлили берилади. Шунингдек, бу мақолада хорижий тажриба асосида коммандит ширкат ҳуқуқий тартибга солинишининг такомиллаштирилиши бўйича таклифлар берилади.

Калит сўзлар: *коммандит ширкат, чекланган шериклик, Умумий ҳуқуқ, Континентал ҳуқуқ, юридик шахс, аналог, ўхшаш жиҳатлар, фарқли жиҳатлар.*

КОММАНДИТНОЕ ТОВАРИЩЕСТВО И ОГРАНИЧЕННОЕ ПАРТНЕРСТВО: СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ СХОДСТВ И РАЗЛИЧИЙ ДВУХ ФОРМ ОСУЩЕСТВЛЕНИЯ СОВМЕСТНОЙ ДЕЯТЕЛЬНОСТИ

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АННОТАЦИЯ

В данной статье тщательно анализируются сходства и различия коммандитного товарищества и ограниченного партнерства на основании научных мнений авторов и законодательства стран Общего права и Континентального права. В этой статье изложен исторический обзор возникновения этих двух видов осуществления совместной деятельности наряду с нынешним регулированием их правового статуса в соответствии с законодательствами Великобритании, Российской федерации и Республики Узбекистан. Более того, в данной статье представлен сравнительно-правовой анализ правовой природы ограниченного партнерства и коммандитного товарищества. Помимо этого, в настоящей статье приведены предложения по совершенствованию правового регулирования института коммандитного товарищества путем внедрения положительного иностранного опыта.

Ключевые слова: *коммандитное товарищество, ограниченное партнерство, Общее право, Континентальное право, юридическое лицо, аналог, сходства, различия.*

INTRODUCTION

Entrepreneurial activity is regarded as one the most essential driving mechanism of economic activity; therefore, humankind has been attaching great importance to the establishment and development of business relationships since the earliest times.

One of such initial forms of joining strength and assets to carry out joint entrepreneurial activity is a partnership institute.

According to the point of Ros Carnwell and Alex Carson, a partnership is the notion of sharing and agreement, with particular emphasis on business, where all partners have rights and obligations to participate and are affected equally by the benefits and disadvantages arising from the partnership. Besides, the authors describe the partnership, enumerating the following defining attributes: confidence in accountability; joint activity; teamwork; members of partnerships share the same vested interests; appropriate governance structures; common goals and objectives; transparent lines of communication within and between partner agencies; reciprocity and empathy [1. p.9].

Anthony Vanduzer analyzed the characteristics of partnership in general as a form of doing business. They are as follows: 1) two or more members; 2) agreement between partners; 3) lawful business; 4) competence of partners; 5) unlimited liability; 6) voluntary registration; 7) no separate legal existence; 8) principal-agent relationship; 9) restriction on transfer of interest. [2, p.28-35].

DISCUSSION AND RESULTS

A partnership is an ancient form of business enterprise, and special laws governing partnerships date as far back as 2300 BC when the Code of Hammurabi explicitly regulated the relations between partners. The partnership was an important part of Roman law, and it played a significant role in the law of merchants, the international commercial law of the Middle Ages. In the nineteenth century, in both England and the United States, a partnership was a popular vehicle for business enterprise. However, the law governing it was jumbled. Common-law principles were mixed with equitable standards, and the result was considerable confusion. Parliament moved to reduce the uncertainty by adopting the Partnership Act of 1890, but codification took longer in the United States. The Commissioners on Uniform State Laws undertook the task at the turn of the twentieth century. The Uniform Partnership Act (UPA), completed in 1914, and the Uniform Limited Partnership Act (ULPA), completed in 1916, were the basis of partnership law for many decades. UPA and ULPA were adopted by all states except Louisiana [3, p.1578].

Having analyzed the author’s points of view and definitions of this initial form of doing business, it can be deduced that a partnership is the coordination of two or more legal or physical entities to carry out a joint activity with a mutual aim to receive a profit.

Despite the common essence of their legal nature, partnerships have various types and names depending on the legal system they are regulated by. For instance, the Common law system regulates the legal nature of "general partnerships" and "limited partnerships" or "limited liability partnerships", whereas the Continental law system provides the provisions regulating the "full (general) partnerships" and "kommandit (special) partnerships" or "ordinary partnerships". In this article, we will thoroughly analyze two types of partnerships - "limited partnerships" and "kommandit (special) partnerships" to understand whether these both forms present different legal concepts, or they are just two different names of the same legal institute.

To clarify whether a kommandit partnership is a full analog of a limited partnership or not, it is appropriate to investigate the historical background of these two forms.

According to the investigations Sukhanov E.A., kommandit partnerships originated in Western Europe in the Middle Ages as a form of joint activity of a person (s) acting externally as an entrepreneur (tractator), and a person (s) limited to making a property contribution to a common cause (commendator). In this regard, it was called commenda, and since the commendator usually did not act externally and remained unknown to third parties (and therefore did not bear property responsibility to them), this method of organizing joint activities was also called compagnia secreta, in this sense becoming the prototype of an unspoken partnership. Therefore, commenda is essentially a well-known mixture of limited and unspoken partnerships. If the commendator did act outwardly, he had limited liability for the general debts (within the limits of his contribution), although he still did not participate in the management of the general affairs. In this situation, they talked about compagnia palese or accomendita; it was the classic limited partnership. In the above-mentioned acts of French commercial law, it was called société en commandite. The German commandita did not arise from a commenda or an accomendita, but from a full partnership of heirs, some of whom, wanting to preserve the common property, could not or did not want to participate actively in business activities and at the same time limiting their liability for common debts. Therefore, here a limited partnership is often considered as a special form of a general partnership, which allows participation in the association of persons without the risk of incurring unlimited liability for its obligations. Such participants (limited partners), who limit their participation in the limited partnership to making property contributions, are excluded from decision-making, while participants with full responsibility (complementary

partners) directly carry out business activities within the partnership, manage all its affairs and represent outside on its behalf. The dispositive regulation of the status of the commandita and its participants makes possible some deviations from its standard model: the rights of commanditists can be both strengthened and further restricted. For example, they may be allowed to engage in business activities, but even in this case, they are not entitled to act on behalf of the limited company as a whole without a power of attorney. [4, p.72-73].

Regarding the first varieties of limited partnerships that existed in history, according to Ulrike Malmendier, the “societates publicanorum”, which was established in Rome in the third century BC, may have arguably been the earliest form of the limited partnership. During the period of prosperity of the Roman Empire, they were roughly equivalent to today's corporations. Some of them had many investors, and interests were publicly tradable. However, they required at least one (and often several) collaborates with unlimited liability [5, p.25].

According to Lamoreaux, Naomi R. and Rosenthal, Jean-Laurent, Colbert's Ordinance of 1673 and the Napoleonic Code of 1807 reinforced the limited partnership concept in European law. In the United States, limited partnerships became widely available in the early 19th century, although several legal restrictions at the time made them unpopular for business ventures. Britain enacted its first limited partnership statute in 1907 [6, p.245].

According to the point of view of Dave De ruysscher, during the evolution of the institute of limited partnerships, they have become one of the most used business instruments by entrepreneurs. It is a striking fact that during the Industrial Revolution and in the first decades of the nineteenth century, in many European countries and the United States, general and ordinary partnerships were regularly chosen as vehicles for business ventures. They were often more popular than limited companies and corporations [7, p.247].

The author Lin Lin notices that in China, the limited partnership has been the most popular business vehicle among private equity funds since the Partnership Enterprise Law of the People’s Republic of China (PEL) adopted it in 2007 [8, p.186].

Having investigated the historical evolution of these two forms of partnerships, it can be concluded that the historical aims of the establishment of partnerships were deemed to be quite similar to the present legal concept of kommandit partnerships in the continental law system or limited partnerships in the common law system. Moreover, while searching on the internet and other resources, it has become obvious that both investigated forms have similar historical backgrounds; however, later the

Common law system and Continental law system have adapted them through introducing slight differences. As a result, nowadays we have two separate legal institutes - “limited partnerships” and “kommandit (special) partnerships”, which, are supposed to have similar legal nature.

According to Section 102 (11) of the Uniform Limited partnership Act of 2001, a limited partnership is defined as “a partnership formed by two or more persons under the laws of a State and having one or more general partners and one or more limited partners”. Section 105 of this Act states that a limited partnership has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership [9, Section 102 (11), 105].

Here it must be taken into consideration that even though the limited partnership is not formed as a legal entity, it must be registered according to the State Statute and the procedure of dissolution tends to be close to the process of dissolution of legal entities, which is also one more special attribute, characterizing this form of doing business. Moreover, even though it is not a legal entity, a limited partnership is authorized to sue, be sued, and defend its interests in its name, which is peculiar to legal entities. Therefore, it can be determined that even though a limited partnership does not have a separate legal personality, it can act in judicial and other governmental bodies in its name, which is also to my point of view one more specific feature of the limited partnership.

Swiss kommandit partnerships are not recognized as legal entities, but are subject to registration in the commercial register, since the law traditionally assumes that they are created exclusively by individuals for the joint implementation of business activities under a common firm [4, p.32].

In French corporate doctrine, kommandit partnerships are sometimes called “hybrid societies” (sociétés hybrids), and in Italian law, they are recognized as having "the ability to bear their legal capacity", although they are not ordinary legal entities [10, p.61-62].

According to Sukhanov E.A., a kommandit partnership for collective investment (Kommanditgesellschaft für kollektive Kapitalanlagen, KkK) formally corresponds to the traditional model of a limited partnership. The difference is that such a limited company is created exclusively for collective investment and has a special subject composition: only joint-stock companies can become its complementaries (full partners) (whereas, as a general rule, only individuals can be unlimited participants in

the Swiss limited company), and only "qualified" (large) investors-pension and insurance funds and similar organizations – can become depositors (limited partners), and the law provides for special rules for admission to and exit from such a kommandit partnership. For such an investment kommandit partnership, along with the charter, a written foundation agreement (Gesellschaftsvertrag) is required, which specifies information about the contributions of participants who make up the "risk capital", as well as specific areas and restrictions on their use, which are then specified in a mandatory prospectus. All this significantly distinguishes the kommandit partnership of collective investment from the ordinary kommandit partnership, turning it into a new organizational and legal form of corporations - a kind of analog of the British-American limited partnership [4, p.107].

Studying the author's point of view, it can be considered that a kommandit partnership in its original form with its original purpose of the creation does not reflect fully the nature of a limited partnership common to the legislation of the United Kingdom or the USA. The characteristics as a "collective investment activity", "a requirement to conclude a partnership agreement" and specific requirements for the legal status of the partners have turned an initial kommandit partnership into the analog of a limited partnership. However, it would lead to significant misunderstanding if we state that a kommandit partnership has become a full analogue of a limited partnership.

As evidence of the aforementioned, we would like to investigate the provisions of our national legislation regulating the kommandit partnership. Civil Code of the Republic of Uzbekistan states that a kommandit partnership is established as a legal entity by agreeing with partners, some of whom (full partners) are directly engaged in the entrepreneurial activity of the partnership, while the other partners (depositors or limited partners) do not participate in the daily activity of the partnership [11, article 61]. Law of the Republic of Uzbekistan №380-II "On business partnerships" of 2001 states that a kommandit partnership is a partnership in which, along with the participants who carry out business activities on behalf of the partnership and are responsible for the obligations of the partnership with all their property (full partners), there are one or more participants (depositors, limited partners) who bear the risk of losses related to the activities of the partnership, within the limits of the amounts of their contributions and do not participate in the implementation of business activities by the partnership [12, article 28].

As an added evidence of the above-mentioned point of view, it is important to refer the Sukhanov E.A., stating that the first fundamental feature of Russian

corporate law is the historically established recognition of the legal personality of full and limited partnerships (while maintaining a freely formed internal structure and personal unlimited joint liability of their participants for common debts). This legislative decision, which is not quite usual for Western European legal systems, is connected with taking into account national traditions: full partnerships and limited partnerships (limited partnerships) were recognized as legal entities both by pre-revolutionary Russian law (in which there was no separate commercial law) and by the first Russian Civil Code of 1922 [4, p.41-42].

Partnerships in the United Kingdom do not have their legal personality (unlike not only European continental trade partnerships, but also partnerships under Scottish law), and therefore are not subject to state registration as special subjects of law. A special type of partnership is a limited partnership, in which there must be at least one partner with unlimited liability (general partner, i.e. complement) and at least one other partner with liability limited to the amount of his contribution to the property of the partnership (limited partner). At the same time, the general partners conduct all the affairs of such a partnership, and the limited liability partners, on the contrary, are excluded from conducting general affairs (and if they participate in them, they begin to be responsible before the creditors of the partnership on an equal basis with the general partners). In other words, it may be considered as a complete analog of the European commandita (partnership on faith). The limited partnership in the USA corresponds to the European design of the limited partnership, having as a historical prototype the French simple limited society (société en commanditee simple, SCS) [4, p.114-118].

Taking into account the aforementioned, it can be deduced that there are various attitudes in the Continental law system related to the regulation of the legal status of kommandit partnerships.

Having thoroughly investigated the authors' points of view, the foreign legislative acts, and our national legislation, it would be now appropriate to enumerate the similar and different characteristics of a kommandit partnership and a limited partnership.

The similarities are as follows:

- both partnership forms have two types of partners: at least one general or full partner with unlimited liability and other limited partners or depositors with liability limited to their contribution;
- the management of both partnership forms is carried out by the general or full partner;

- the conduct of business is carried out by the general or full partner;
- both partnership forms can be established for purposes of carrying out joint activity whether it is entrepreneurial or investment.

The differences are as follows:

- a kommandit partnership is established as a legal entity, while a limited partnership is not a legal entity and established based on agreement of partners and registered in a State register;
- only individual entrepreneurs or business entities can be full partners and physical entities or legal entities can be depositors in kommandit partnerships, while there is no such a requirement for the legal status of the partner in a limited partnership;
- a full partner of a kommandit partnership cannot be a full partner of any other kommandit partnership, while there is also no such requirement for general partners in a limited partnership.

Based on the provided analysis in this article and the table of similarities and differences of limited and kommandit partnerships indicated in the previous paragraph, it should be concluded that an institute of a kommandit partnership common to several continental law system countries, including the Republic of Uzbekistan, can be regarded as an analog of a limited partnership, presented in the legislations of the Common law countries; however, due to some differences enumerated above, they cannot be regarded as an identical form with the same legal nature.

Taking this into consideration, we would like to introduce the following suggestions:

1. According to the Decree of the President of the Republic of Uzbekistan “On additional measures on improvement of mechanisms of financing projects in the field of entrepreneurship and innovation” №5583 of November 24, 2018, the Ministry of innovative development has been given a task to work out the draft law of the Republic of Uzbekistan "On partnerships" till January 1, 2020 [13, paragraph 7]. We suggest not to adopt a separate Law, regulating the legal status of partnerships. Because our national legislation already contains the legal concept of partnerships though under a different name - a kommandit partnership. Therefore, we consider that it would not be appropriate to adopt a separate legislative act to regulate the existing legal institute.
2. Based on our analysis and research on the practical usage of a limited partnership, we have concluded that this very form of partnership has gained

widespread use in Common law countries because of its advantages in carrying out joint entrepreneurial activity. Therefore, we would like to suggest the relevant changes to the national legislative acts regulating a legal status of a kommandit partnership reflecting the differences enumerated in the table above.

CONCLUSION

We would like to state that both a kommandit partnership and a limited partnership have their characteristics, advantageous or disadvantageous based on the individual purpose they can be used for. Both partnership forms have been coming into widespread acceptance throughout history regardless of European countries or Great Britain and the USA. However, the results of the research show that a limited partnership is considered as much more attractive by investors and business people rather than a kommandit partnership. Therefore, reforming the legal nature of a kommandit partnership would serve as a contribution to the development of the investment potential of the Republic of Uzbekistan.

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