

The Legal Nature of Relations Between Limited Partner and a Trust Partnership in Legislation of Russia and the United States of America

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Abstract: The article is devoted to the comparative-legal analysis of the nature of the relationship between the participants-depositors and a trust partnership in legislation of Russia and the United States of America. The author assumes that the trust partnership (or partnership in commendam) in Russia is one of the legal forms of legal entity and corresponds to a limited partnership, - the form of business in the United States. Both the Russian trust partnership and limited partnership of United States are characterized by two features: the participants of these organizations, in general, do not participate in the management and business activities of the partnership; they do not take on a liability of the partnership in commendam (limited partnership). The legal regulation of the limited partnership in Russia and United States has similarities and differences. In this article, the author considers the different aspects of legal regulation of social relations between limited partner and limited partnership (limited partnership). The author shows that the limited partner in the limited partnership in the United States is a founder in contrast to Russia.

Key words: Limited partner • Partnership in commendam • The legislation of Russia and United States of America

INTRODUCTION

The trust partnership (partnership in commendam) in Russia is one of the legal forms of legal entity and corresponds to a limited partnership, – the form of business in the United States.

The principles of the legal status of trust partnership in Russia are enshrined in the Civil Code of the Russian Federation (CCRF) [1]. According to p. 1 article 82 of CCRF, a trust partnership (partnership in commendam) is recognized as a partnership in which, there are one or several participants-depositors (the limited partners), who bear the risk of losses related with the activity of the partnership within the limits of their investments and do not participate in the entrepreneurial activity of a partnership along with participants acting on behalf of a partnership and being liable for the obligations of the partnership with their property (general partners).

The principles of the legal status of a limited partnership are fixed in Uniform Limited Partnership Act (ULPA), adopted in 1916 with changes and supplements introduced in 1976, 1985 and 2001 (the latest version is called Revised Uniform Limited Partnership Act) [2].

The legal state of a trust partnership in the United States is stipulated by the fact that the US legal system, in general, refers to the number of precedent legal systems. In addition, each state has ratified ULPA in one or another version. At the same time, the legal status of a limited partnership in Louisiana has been enshrined in the Civil Code of Louisiana (CCL) [3].

According to section 104 RULPA, the limited partnership is organization, independent from the participants. Limited partnership has its own name (section 108 RULPA); a management structure (section 402 RULPA); the rights to act in legal relations on its own name and be a plaintiff and defendant in court, to make a claim against the partner related with harms as a result of infringe of the constituent contract or nonfulfillment of obligations to the partnership (section 105 RULPA).

North American researchers distinguish the following characteristics of limited partnership:

- Association of two or more individuals. The full partnership is different from the individual entrepreneur on this basis;

- Active behavior of the participants in the partnership - the general partners;
- Joint activities of the partners, i.e. we consider a unit legal subject and the right of each partner to participate in the management and distribution of profits and losses;
- Entrepreneurial character of activity, the objective of a full partnership is profit-making; the presence of one or more depositors [4].

These characteristics are reflected in jurisprudence. For example, a judge decided in the case of *Bergergon v. Courtiade* that the agreement to buy raw land for investment is a partnership [5]. The decision of the court on the case of *O'Bryan v. Bickett*, the court explained that the purchase of property for its qualitative changes, resale, or both indicates the partnership relations [6].

Judicial practice proceed from the fact that if the co-owners make the active steps aimed at the development of common property, for example, improve the real estate, rent it, etc., these activities also forms a partnership. For example, the court decided in the case *Wooten v. Marshall* [7] that the agreement between the parties on the development of the network of stores is a partnership, rather agreement on investment property. Similar conclusions were made in other court decisions [8].

There are both similarities and differences in the legal regulation of establishment of a limited partnership in Russia and in the United States. Two criteria are in the basis of the status of limited partner in the legislation of Russia and United States: 1) these partners, in general, do not participate in the management and business activities of the partnership; 2) they are not liable for the obligations of the trust partnership.

In this study, we also consider the nature of relations between the limited partner and the partnership itself. Obviously, this problem is solved in Russian and USA legislation in different ways.

The par. 1, art. 83 of the CCRF indicates that the limited partners do not participate in the signing of the constituent contract, i.e. they are not the founders.

In the North American law, the limited partnership according to section 102 (11) RULPA consists of one or more general partners and one or more depositors. According to section 102 (13) RULPA, the agreement on the establishment of a limited partnership is concluded by all partners, as the general partners as limited partners. This occurs also in the other USA states that can be concluded from art. 2837 CCL. Thus, a participant-depositors becomes the founder of the limited partnership.

The solution to the question, which of the above mentioned rules, either established by the Russian legislation or enshrined in the law of the United States, is more reasonable, is closely related to two problems concerning, first, the legal nature of the constituent contract and secondly, the content of other legal norms regulating the legal status of the participants-depositors.

According to some researchers, the constituent contract "regulates only the internal relations in the partnership and since there is no another agreement (besides constituent contract) at the stage of establishment of the partnership (up to the moment of its registration), the regulation of internal relations objectively exists prior and regardless of the partnership establishment and is ensured by the constituent contract" [9].

At the same time, there is a different point of view that there is a simple partnership among the founders before registration of the new entity and in the relations between the founders and the future legal entity - unbailled procuration [10].

We believe that there is no need for any other legal documents besides the constituent contract of the general partners.

This approach can be justified as follows. In judicial practice, there are suits on recognition of the legal entity state registration as void. The legislator does not define the civil law consequences of the recognition of state registration of a legal entity as void. Thus, the decision on certain case, the FAS of the Far Eastern District indicated that: "the record about the void state registration of OAO "459 DOK" added on 04.10.2004 in the register of legal entities" is not similar to a record on its liquidation. Therefore, the capacity of the legal entity – OAO "459 DOK" continued due to par. 3 of article 49 of CCRF [11].

Therefore, in case of recognition of the void state registration, the legal entity has legal personality until its liquidation. Undoubtedly, that it is guided by the constituent documents in the part not contradicting the legislation during this period of its activity. That is, the constituent contract acts independently from the state registration of the general partnership or limited partnership as a legal entity.

Finally, there are a number of differences between the contract of simple partnership and the constituent contract and between a simple partnership and full or limited partnerships, in this regard, the identification of the founders' relations and the relations of special partnership is not correct.

According to par. 1 art. 1041 of the CCRF, the contract of simple partnership (joint venture agreement), two or several persons (partners) agree to join their endowments and act together without forming a legal entity for profit or achieve another legal purpose.

There are a number of concepts in science aimed at differentiation of a full partnership and a simple partnership. Undoubtedly, the civil lawyers emphasize that the simple partnership, unlike to a full partnership does not have the status of a legal entity. As for other features, their list varies depending on the point of view of particular researcher.

We suppose that I.V. Ovod is right claiming what Russian simple partnership differs from the full (limited) partnership by following features: 1) purpose of the activity of the simple partnership is “any useful activities”; 2) in a simple partnership, “the contribution is any good that can be valued in money either the business reputation, business contacts or professional skills”; 3) “the property transferred into the partnership, is the common contribution property of the partners” [12].

However, this characteristic should be added by another statement deriving from juridical practice that the simple partnership is created, as a rule, for the implementation of single projects, aimed at a certain result, i.e. the existence of simple partnership is limited in time. On the other hand, the business partnerships like other legal entities, are created for an unlimited period.

Moreover, relations between the founders and the prospective legal entity can not be regulated by any legal norms, because according to the current Russian legislation, “the prospective legal entity” is not a subject of law, therefore, cannot be a member of the analyzed relations.

Thus, the constituent contract regulates the internal relationships of the partnership as a legal entity from its conclusion, i.e. regardless of the state registration of the partnership.

As mentioned above, the limited partners do not participate in the signing of the constituent contract according to the Russian legislation. After registration of the trust partnership, every participant-depositor enters into a contract with the limited partnership, which defines the conditions of its participation in the partnership.

There is scientific opinion that the contract between the partnership and the depositor is “connected to the category of agreements on providing of the financial services”. At the same time, there are differences of a depositor from the “ordinary creditor (lender)”: 1) the depositor shall have the right to dividends, which value “cannot be known in advance and fixed”; 2) the property

of the depositor unlike the property of the creditor joins the share capital; 3) the depositor may withdraw from a partnership at the end of the financial year and receive the contribution in the order, stipulated by the constituent contract; 4) upon liquidation of the partnership, “the requirements of unsecured creditors are most privileged” [9].

This list can be added by the risk of losses of depositors in the value of contribution in the share capital, in contrast to other creditors, which will undoubtedly bear a certain but different risk. If the limited partner acquires the certain rights related to making of a contribution (to receive the part of profit or the value of the share in case of withdrawal from the trust partnership), only in the case of the successful operations of the partnership, then the creditor (lender) in case of necessity to return a loan is eligible to expect the performance of an obligation, regardless whether the activity of the partnership profitable or not.

Therefore, a contract concluded by the limited partner and depositor, is not a contract on the furnishing of financial services. This contract signed between the general partners, legalizes the participation conditions in a limited partnership. There is one significant difference between these contracts. The constituent contract unlike an agreement between limited partner and trust partnerships, regulates both participation of the general partners and some of the issues related to establishment of the organization. However, the limited partners that make the sufficient contributions to the join capital of the partnership should be granted the right to participate in constituent activities of the partnership by participation in the conclusion of the constituent contract.

The analysis of the second aspect of the problem shows that the registration of relationships of the limited partners in a trust partnership by a separate agreement is unjustified due to:

- there is a question arising what the founding document will regulate the relations between participants and the partnership if the partnership consists of one general partner and one depositor (par. 1 art. 86 of the CCRF). Due to par. 3 art. 154 of the CCRF, the conclusion of the contract requires the agreement of two parties (bilateral bargain) either three or more parties (multilateral bargain). It should be noted that Russian legislation does not contain a rule that the general partnership may initially be created by one general partner and one depositor. This prompted the researchers to conclude that the trust partnership can be established initially at least

by two general partners and one depositor. For example, N.V. Kozlova writes: "Limited partnership (the trust partnership) cannot be established less than two general partners and one depositor... although the partnership shall be maintained if remains at least one general partner and one investor..." [10].

According to par. 5, art. 82 of CCRF, the rules of the CCRF on the full partnership are applied to the trust partnership, so far this does not contradict the rules of the CCRF on the trust partnership and we should agree with this approach. However, this situation is not sufficiently comply with the legal norm that the limited partnership is preserved if remains at least one general partner and one investor;

- The position of depositors is similar to the position of preference share owners in a joint-stock company. The issuance of the certificate on participation to depositor occurs according to par. 1 art. 85 of CCRF; the right of depositor solely for the contribution leaving the partnership; and the absence of a right to participate in the changing of conditions of the constituent contract, transforms the relationship between the depositor and a partnership regards to the loan.

It should be noted that there is a different scientific approach to solve these problems. N.V. Kozlova writes: "Admitting this a situation, the legislator should specify that in this case, constituent contract can be the constituent document of a limited partnership signed between the remaining participants or the charter approved by a general partner (or all partners)" [10].

In our opinion, the nature and content of the relations arising between participants of a limited partnership upon its establishment, on the one hand and the nature and content of relations between the participants in the partnership after remaining one general partner and one limited partner, on the other hand, are similar.

In this regard, different constituent documents at the establishment of partnerships and during activities of the partnership with remained one general partner and one limited partner are not required.

Thus, the Russian legislators should learn from the United States experience in this field and ensure a legal provision that the limited partners participate in the partnership likewise general partners and sign the constituent contract without special agreement.

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